(12)

No. 90-1124-CFY
Status: GRANTED

Title: Keith Jacobson, Petitioner
v.
United States

Docketed:
January 14, 1991

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Friedman,Herbert J., Moyer Jr.,George Hamilton

Counsel for respondent: Solicitor General

NOTE--90th day was Sun., 1/13.

Entry	Date	Note	Proceedings and Orders
1	Jan 14 1991	G	Petition for writ of certiorari filed.
3	Feb 8 1991		Order extending time to file response to petition until March 18, 1991.
4	Mar 8 1991		Brief of respondent United States in opposition filed.
5	Mar 13 1991		DISTRIBUTED. March 29, 1991
6	Mar 27 1991	X	Reply brief of petitioner Keith Jacobson filed.
8	Apr 8 1991		REDISTRIBUTED. April 12, 1991
10	Apr 15 1991		REDISTRIBUTED. April 19, 1991
11	Apr 22 1991		Petition GRANTED. limited to Question 3 presented by the petition.
			**********
13	May 16 1991		Order extending time to file brief of petitioner on the merits until June 21, 1991.
14	Jun 6 1991		Joint appendix filed.
15	Jun 18 1991	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
17	Jun 19 1991		Brief amici curiae of ACLU, et al. filed.
16	Jun 21 1991		Order further extending time to file brief of petitioner on the merits until June 26, 1991.
18	Jun 26 1991		Brief of petitioner Keith Jacobson filed.
19	Jun 28 1991		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
23	Jul 25 1991		Order extending time to file brief of respondent on the merits until August 5, 1991.
20	Jul 26 1991		Brief amici curiae of National Center for Missing and Exploited Children, et al. filed.
21	Jul 26 1991		Brief amici curiae of Hon. Thomas J. Bliley Jr., et al. filed.
24	Aug 5 1991		Brief of respondent United States filed.
29	Aug 28 1991		Petitioner's reply brief due 9/17/91; respondent's brief on the merits was not received until 8/17/91.
28	Aug 29 1991		Record filed.
		*	Certified records and briefs - U.S. Court of Appeals, Eighth Circuit.
27	Aug 30 1991		Record filed.
		*	Certified Original Record - U.S. District Court, District of Nebraska (1 Box)
25	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 6, 1991. (3RD CASE)

8 pp

No. 90-1124-CFY

Entry	Date	Note	Proceedings and Orders
26	Sep 6 1991		CIRCULATED.
30	Sep 17 1991	X	Reply brief of petitioner Keith Jacobson filed.
31	Sep 23 1991		Record filed.
		*	Original Exhibits - United States District Court, District of Nebraska SEALED EXHIBITS
32	Nov 6 1991		ARGUED.

No. 90-1124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Government knows the defendant has committed no crime, is not planning to commit a crime and has never engaged in any criminal activity, whether the Government needs some cause, reason or suspicion to make petitioner the subject of five undercover attempts to induce the defendant to commit the offense of receiving child pornography through the mails extending over the course of twenty seven months before the petitioner finally purchases and accepts delivery of a single magazine which has been manufactured, advertised, sold and delivered to him by the Government?

2. Where the Government, as part of three unsuccessful undercover attempts to induce the petitioner to commit the offense of receiving child pornography through the mails obtains answers to sexual attitude surveys from the petitioner by assuring him that his responses are confidential and the use that will be made of them is a lawful use, whether the Government can rely on statements that the respondent is interested in "preteen sex", "stories with a gay theme" and "teenage sexuality" to prove predisposition to commit a crime when, after the surveys have been completed by petitioner, petitioner is finally induced in a fifth undercover operation to purchase and accept delivery of a single magazine depicting "minors in sex action fun?"

3. Where the Government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade the defendant to receive child pornography through the mails and the petitioner does not qualify either under the Attorney General's Guidelines for the conduct of undercover operations or the guidelines established by the Postal Inspectors for inclusion in the undercover operation in which petitioner is finally ensnared, whether the petitioner has been entrapped as a matter of law?

4. Where the Child Protection Act of 1984, 18 U.S.C. sec. 2252 (a)(2) and (b) provides a penalty of up to ten years imprisonment and a $100,000.00 fine for receiving child pornography through the mails, whether the trial court should instruct the jury in the trial of the petitioner upon one count of violating said statute that the Government must prove that the defendant knowingly received child pornography through the mails *knowing such receipt to be unlawful* (underlined language omitted from instruction given)?

5. Whether there is a distinct Fifth Amendment "outrageous Government conduct" defense in federal criminal cases and if so how does it relate to entrapment?

6. If there is a distinct "outrageous government conduct" defense in federal criminal cases and the Government has persistently attempted to induce the defendant to commit a crime, fabricted fictitious criminal enterprises and manufactured, advertised, sold and delivered child pornography is this Government conduct outrageous in this case?

7. Where the defendant raises the entrapment defense, whether the trial court should define "inducement" as that term is used in the entrapment instruction and where the inducement is by deception, whether the court should also define "fraud?"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Eighth Circuit's Panel Opinion is reported in 893 F.2d 999 (1990). The Eighth Circuit's Opinion on rehearing en banc is reported at 916 F.2d 467 (1990).

JURISDICTION

The judgment petitioner seeks to have the court review was entered on October 15, 1990. There is no applicable order for rehearing. No order has been entered extending the time in which to file the petition for writ of certiorari. Rule II(e)(iii), Rules of the Supreme Court is not applicable. The jurisdiction of this Court is invoked under 18 U.S.C. sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. sec 2252 (1986):

(a) Any person who——

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual dipiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually expicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including through the mails; if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned no more than 10 years, or both, but, if such an individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

Title 18 U.S.C. sec. 2256 (1986):

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse (for the purpose of sexual stimulation); or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than the individual.

(5) "visual depiction" includes undeveloped film or videotape.

Fourth Amendment to the Constitution of the United States.

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prop-

erty, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION: Petitioner was indicted by a Federal Grand Jury and tried in the United States District Court for the District of Nebraska at Omaha on one count of violating Title 18 U.S.C. sec. 2252 (2), receiving child pornography that had been mailed.

STATEMENT OF MATERIAL FACTS: Keith M. Jacobson is 57 years old. He was born in Newman Grove, Nebraska, October 20, 1930 to a farm family. He graduated from Newman Grove High School in 1949 and helped his father farm for a year and half (T407).

He joined the Navy in early 1951 and saw sea duty aboard the U.S.S. Iowa and the U.S.S. Gerke. While aboard the Gerke he saw action in Won San Harbor during the Korean War (T408). He was honorably discharged on March 11, 1955 (T409). In the fall of 1955, he enrolled at Nebraska Wesleyan University under the G.I. Bill majoring in business administration (T410).

In 1958, Mr. Jacobson was convicted of driving under the influence of alcoholic liquor in Lancaster County, left school and joined the Army (T411). However, after his retirement from the Army, he enrolled in an off-campus degree completion program at Upper Iowa University and obtained a bachelor of arts degree in public administration (T411). Driving under the influence was the only offense he had ever committed prior to his indictment in this case (T422).

While in the Army, petitioner served in Korea twice (T412, 414), Italy (T414), Germany (T416), and Viet Nam (T415). He became an information specialist which involved him in newspaper publishing, news writing, troop indoctrination, and public relations (T413). He held the rank of Staff Sergeant (T413). While in Viet

Nam, he was assigned to the press center at Da Nang where he came under fire (T416). He was awarded the Bronze Star for his service in Viet Nam (T417) and also received the Army Commendation Medal.

He retired from the service at Fort Riley, Kansas in 1974 (T418). In 1975, he moved back to Newman Grove to be closer to his father who had suffered a stroke in 1972 (T418). In 1978, he moved to his family's farm a half mile east of Newman Grove where he raises a few head of livestock (T419).

After moving back to Newman Grove, Jacobson worked for a shopper's guide in a nearby town for a time and then accepted a job driving a school bus for the Newman Grove school district. In 1979, he was made supervisor which included the responsibility for the safety and repair of the four buses and three vans the school district employed (T421). Petitioner received a certificate on May 20, 1986, for his faithful service (T422).

Six witnesses from Newman Grove testified that petitioner had an excellant reputation in the community as a law abiding and truthful citizen (T274-316).

The petitioner described his sexual preference as "bisexual". He became interested in reading about gay issues, lesbian issues, health issues and gay legislative matters after he retired from the Army. He denied, however, that he was a practicing homosexual or ever had been (T423).

On February 4, 1984, petitioner ordered two magazines, Bare Boys I and Bare Boys II (E18A, 18B), and a brochure from a Dennis Odom doing business as Electric Moon in San Diego, California (T7). On May 11, 1984, the Government executed a search warrant on the Odom establishment and found petitioner's name on Odom's mailing list together with copies of the magazines and a receipt showing what Odom had mailed to Jacobson (T7). The two magazines were nudist magazines depict-

ing boys in their teens and early twenties in outdoor settings. Dr. Richard Dienspier, a psychologist and professor on human sexuality at the University of Nebraska testified that the magazines were not child pornography because the photographs did not show sexual intercourse, bestiality, masturbation or lascivious exhibition of genitals as mentioned by 18 U.S.C. sec. 2256 (T397). The Government did not challenge this testimony. The Government stipulated that petitioner's receipt of Bare Boys I and II was not a violation of Federal law (T8). The brochure (E17) was a newsletter which indicated stores in the United States and Europe which sold sexually oriented material. The Government offered no evidence that petitioner had ever ordered or received any items from these stores and petitioner denied doing so (T425).

Due to the fact that his name was on Odom's mailing list, the Government included Jacobson in a Postal Inspector's undercover operation called The American Hedonist Society. Petitioner's name and address was forwarded to Stuart O. Patten, a Postal Inspector and prohibited mailing specialist stationed at Omaha, Nebraska (T165). He sent Jacobson a sexual attitude survey and a membership application for the Society (T166, E7), which was an association of postal inspectors for the central region based in Madison, Wisconsin (T166). The society was, "a sting operaiton to try to get people to join it and perhaps trade through it" (T166). The format called for "testing" of the subject by means of the survey and a newsletter which was mailed four times a year to subjects who joined the society. The newsletter came for as long as the Postal Inspectors wished to send it (T171). The last paragraph of the sexual attitude survey states in capital letters:

> I understand that the information which I have provided shall be held in strict confidence by the Society and all information received by me from the Society shall be held in strict confidence by me.

On February 21, 1985, Jacobson filled out the survey, sent his membership fee and thereafter received the newsletter. The Government offered no evidence that Jacobson ever traded anything with the Society or through it, let alone child pornography.

The Government, however, perservered. Patten retired March 3, 1985 (T710). In January, 1986, one Calvin Comfort (T176) was assigned to Patten's position. Comfort had been a letter carrier for three years, with two weeks of training in the restricted mailing of child pornography (T329). Although two postal inspectors who had preceeded Comfort (T329:1) had showed no interest in petitioner, on May 27, 1986 (T335) Comfort initiated another undercover scheme involving two more postal service inventions, Heartland Institute for a New Tomorrow and Midlands Data Research (T333).

According to its contact letter, Midlands Data Research was "a small, old, established firm in Lincoln, Nebraska" conducting "consumer surveys on a variety of subjects" (E8). The subject of the "consumer survey" was another sexual preference and attitude test. Petitioner did not complete the survey (340:7), but sent back the contact letter on May 31, 1986, with a note stating, "Please feel free to send me more information. I am interested in teenage sexuality".

Comfort tried again. On July 28, 1986, Comfort, posing as "Jean Daniels", director Heartland Institute for a New Tomorrow, wrote petitioner explaining that Heartland was a lobbying organization seeking liberalization of sexually repressive legislation and importuning petitioner to complete and return the sexual survey (T369). On August 20, 1986, Jacobson did (E9, 9A). Comfort, still posing as Jean Daniels, then sent petitioner a list of five names of persons with supposedly similar sexual interest, all Comfort psudonyms, with whom Jacobson could correspond (T341).

Petitioner did not (T342). Comfort pushed harder. Posing as "Carl Long" (T342), he wrote to the petitioner on September 17, 1986 (E23). His Carl Long identity was to "mirror" Jacobson, to become like him in order to gain more information (T342), and, if petitioner was inclined to do so, invite him to send child pornography through the mails (T343). Comfort wrote petitioner three times and petitioner responded twice (T344), then broke off the "Carl Long" correspondence. On one of these occasions, September 29, 1988, Jacobson sent Comfort a newspaper, "The New York Native" (E14A), which contained homosexual articles. The Government made no claim that this violated any laws.

Comfort did not institute a "mail cover" upon petitioner's mail (T348). This device allows a law enforcement agency to watch the mail coming to an individual for a period of thirty days to see who is sending mail to the petitioner (T248). Comfort was familiar with at least some of the persons who were sending child pornography (T350). If petitioner had been receiving any, it would be fair to infer that a "mail cover" would have disclosed that fact.

By February of 1987, petitioner had been the target of three sting operations in which he had had an opportunity to violate the law each time he received a letter from "Carl Long" or a newsletter from the Hedonist Society. Jacobson had given postal authorities no reason to believe he had violated the law or was thinking about violating it, let alone that he was engaged in a course of criminal conduct.

In 1986, one Ray Mack, the supervisor of a prohibited mails team of Postal Inspectors at Newark, New Jersey (T91) invented yet another undercover operation which, in 1987, was elevated to national scope and named "Project Looking Glass" (T94).

The operation was commenced by the Postal Inspection Service to target suspected pedophiles and others who

receive child pornography through the mails. *United States v. Mitchell*, 915 F.2d 521, (C.A. 9, 1990). On the sexual attitude survey Jacobson completed for "The American Hedonist Society," he stated that he was "opposed to pedophilia" (E7).

The Postal Inspection Service's unrelenting and ingenious invention of child pornography undercover operations is both remarkable and curious. According to the Government, one Catherine Stubblefield Wilson controlled about eighty percent of the United States Market for child pornography. According to Postal Inspector William Anderson, the American market for mail order child pornography "virtually dried up overnight" after Wilson was arrested in 1982 and her mailing list, consisting of many thousands of names and addresses, was distributed to postal inspectors nationwide. *United States v. Mitchell*, *supra*, footnote 5, 915 F.2d at 525.

The Justice Department concluded that subjects would be included in Project Looking Glass if their names had been found on a mailing list that had been seized by a Postal Inspector in the last seven or eight years and they had responded to at least one regional "sting" testing program in the last three years (T96) (T97). Mack described testing differently than Comfort, stating that it was a way to contact individuals who had committed a criminal offense or were in the act of committing a criminal offense (T92). By this admeasurement, Jacobson did not qualify for testing, and therefore, Project Looking Glass. Mack also stated that subjects were included only if the individual's name had come up from two independent sources (96:25). Petitioner did not qualify under this criteria either because the Hedonist Society and Heartland Surveys would not have been sent to petitioner but for his order from a single independent source, Electric Moon (T346).[1]

[1] To get out of a testing program one can simply refuse to respond (T379). Or, a subject can send something saying he does not

Furthermore, the United States Attorney General's Guidelines on FBI Undercover operations 16 (Dec. 31, 1980) reprinted in Law Enforcement Undercover Activities: Hearings before the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, U.S. Senate, 97th Congress, 2d Sess. 86, 101 (1982) states that undercover operations offering an inducement to illegal activities are not to be approved unless:

> (a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity.
>
> (b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

William H. Webster, then director of the FBI testified during the Senate Select Committee hearings:

> One of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts and circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred, is occurring or is likely to occur. In other words, a reasonable cause provision. . . . (Senate Hearings, supra, at 1055.) I have no problem with requiring an articulation of the reasons. I think we are doing that now, and we will

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want to receive anything more from the particular front organization doing the testing. However, being dropped from one sting operation would not mean that the subject would be dropped from all. That would require "legal action" (T380). Of course, to institute that a subject would need to know he has a subject.

> certainly do it in the future. . . . (Senate Hearings at 1055.)

These same Attorney General's Guidelines attempt to minimize the possibility of overly persistant solicitation by limiting the initial duration of an undercover operation to six months. Gersham, *Abscam, The Judiciary and the Ethics of Entrapment*, 91 Yale L.J. 1565 n.100 (1982) quoted in *United States v. Dion*, 762 F.2d 674, 686 (C.A.8, 1985).

Therefore, before he was included in Project Looking Glass, the Government knew what Jacobson bought from Electric Moon three years earlier. The Government knew it was not child pornography. The Government also knew that Jacobson had rebuffed numerous attempts to induce him to send or receive child pornography offered through the newsletter of The American Hedonist Society and the "Carl Long" correspondence. The Government knew that petitioner was opposed to pedophilia. The Government knew that petitioner did not fit the Attorney General's guidelines and the Postal Inspection Service's criteria for inclusion in Project Looking Glass. The Government knew Jacobson had been a target of undercover operations for at least eighteen months longer than the Attorney General's Guidelines permit.

Calvin Comfort knew that petitioner was "interested in teenage sexuality," and "stories with a gay theme" (E7). Comfort recognized a weakness which he could exploit.

A contact letter (E1) ostensibly from the "Far Eastern Trading Co. Ltd." was sent to petitioner March 23, 1987. The letter states, "All material that you order from your (sic) company will be sent to you through our branch office in the Virgin Islands. After consultations with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without a court order".

Petitioner completed a coupon asking for more information and was sent a catalog (E2) from which he ordered "Boys Who Love Boys", the material he is charged by the indictment with receiving. The catalog described the magazine as, "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys you will be delighted with this". Mack prepared and copied it on post office word processors (T106).

"Boys Who Love Boys", itself, is not a magazine but a copy of a magazine that had been seized by customs. The original was produced in Denmark (T157). The Postal Inspectors did not have enough seized material to fill all orders so they produced copies on a postal service copying machine in Washington D.C. (T143, T144). Mack then mailed the photocopied magazine to Comfort (T112).

At the same time, the Customs Service had organized its own sting, "Operation Borderline" (T26). Its purpose was to "target people who were involved in alleged importing of child pornography" (T26). Obviously, Comfort had no evidence that Jacobson was doing this.

Canadian officials opened a post office box in Hull, Quebec Canada, under the name of Produit Outaouis (T27). Persons were included if their names appeared on a source document in another agency's files (T29). Jacobson's name was included (T29) from two sources, one of the test programs previously conducted by the Postal Service and from the Electric Moon investigation (T30).

Customs printed a brochure in French and English listing available materials for sale (T31). The materials were photos taken from within the pages of sexually explicit magazines depicting children (T32) printed specially for the Customs Service by Kodak in Chicago (T48).

Jacobsen ordered a set of photographs entitled Piccolo (T37). The Piccolo set was not delivered (T52).

On June 16, 1987, Comfort made a controlled delivery of "Boys Who Love Boys" to Jacobson (T219). A "controlled delivery" means that he took the envelope containing the magazine to Newman Grove, placed it on a desk in the post office where he could see it, had the postmaster put a notice to call at the window in the petitioner's box and, when he responded to the notice, observed the postmaster hand petitioner the envelope (T219-228).

Comfort then called a waiting postal inspector in Omaha and obtained a search warrant for Jacobson's residence (T229). Comfort, Madison County Sheriff Vern Hjorth and three Customs Agents then went to Jacobson's home to execute the warrant (T230). At least three of them were armed (T435).

Jacobson was returning from his morning coffee (T431). Two cars followed him into his driveway and parked so that he was blocked (T434). Comfort approached petitioner, exhibited credentials and the search warrant and said, "Let's go in the house". (T435). The search party and petitioner entered petitioner's home and spent the next hour and forty minutes going through it (T230). The only trial evidence produced by the search were the two lawfully obtained child nudist magazines which the Government had known since the raid on Electric Moon in 1984 that the petitioner possessed and, of course, "Boys Who Love Boys," which the Government had just given him.

Petitioner was indicted on September 14, 1987, on one count of receiving a visual depiction the production of which involved the use of a minor engaging in sexually explicit conduct (CR4) which magazine had been mailed.

Petitioner was tried to a jury consisting of nine women and three men beginning April 22, 1988. The jury returned a verdict of guilty on April 26, 1988 (C.R. 113). Sentence was passed June 30, 1988.

Respondent appealed his conviction to the Eighth Circuit Court of Appeals. On January 12, 1990, a panel of the Eighth Circuit Court of Appeals reversed the respondent's conviction holding that the petitioner had been entrapped as a matter of law because the Government "did not have a reasonable suspicion based upon articulable facts" that Jacobson was predisposed to commit the crime with which he was charged. *United States v. Jacobson*, 893 F.2d 999 (C.A. 8, 1990). Upon the petition of the United States Attorney for the District of Nebraska and his suggestion for rehearing en banc, the Eighth Circuit granted rehearing en banc. (889 F.2d 1549).

Upon rehearing en banc, the Eighth Circuit Court of Appeals reinstated petitioners conviction, holding that no reasonable suspicion was necessary because "Jacobson had no constitutional right to be free of investigation." *United States v. Jacobson*, 916 F.2d 467 (C.A. 8, 1990).

ARGUMENT

1. In the District Court and in the Circuit Court, petitioner contended that evidence of predisposition was evidence that the defendant had committed a crime, was about to commit a crime or was engaged in a course of criminal conduct.

The Government offered no such evidence. Instead, the Government took scattered answers from the sexual attitude surveys obtained before petitioner's inclusion in Project Looking Glass, Bare Boys I and II and the Carl Long correspondence and claimed that these items demonstrated predisposition.

Petitioner urged that this was only proof of a status, i.e., petitioner's interest in "stories with a gay theme." Petitioner pointed out that:

> The crime punished by the statute against the sexual exploitation of children, however, does not consist in the cravings of the audience. Private fantasies

> are not within the statute's ambit. The crime is the offense against the child. . . . *United States v. Wiegand*, 812 F.2d 1239 (C.A. 9, 1987).

Petitioner argued that prior Eighth Circuit cases had always required the Government to show a "readiness and willingness to break the law," *United States v. Dawson*, 467 F.2d 668 (C.A. 8, 1978) to prove predisposition and that this was consistent with cases from the other circuits. Cf. *United States v. Thoma*, 726 Fed. 1191 (C.A.7, 1984); *United States v. Esch*, 832 F.2d 531 (C.A.10, 1987). Petitioner's contention was bottomed on the language of Chief Justice Warren in *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 853, 78 S.Ct. (1958) that the Government was required to offer more than evidence of "the weakness of an innocent party" to overcome the defense of entrapment. Since there was no objective evidence from which rational minds could conclude that defendant had committed a crime, was committing a crime or was likely to commit one when petitioner was made the subject of Project Looking Glass, petitioner alleged that he was entitled to summary acquital under such prior Eighth Circuit cases as *United States v. Lard*, 743 F.2d 674 (C.A. 8, 1978) and *United States v. Dion*, *supra*.

Judge Heaney, who wrote the panel opinion, implicitly accepted the petitioner's view, requiring the government to have a "reasonable suspicion based upon articulable facts that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future."

This rule quite clearly tracks Department of Justice Guidelines for undercover operations. Moreover it is clearly presaged by other Supreme Court and Circuit Court opinions.

In *Grimm v. United States*, 156 U.S. 604, 39 L.Ed. 550, 15 S.Ct. 470 (1895), one of the *Decoy Letter Cases*, the court affirmed a conviction for dispensing pornography

through the mails without specifically mentioning an entrapment defense. The court held that Grimm's conviction could stand even though the contraband was solicited by an undercover Government agent because the agent "suspected that the defendant was engaged in a business offensive to good morals, sought information directly from him (and it) does not appear that it was the purpose of the post office inspectors to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." *Id.*, 546 U.S. 610.

The Ninth Circuit court overturned a conviction of illegally importing Chinese in *Woo Wai v. United States*, 223 Fed. 412 (C.A. 9, 1915). The court's conclusion focused on the absence of a reasonable suspicion to conclude that petitioner was engaged in ongoing criminal activity:

> . . . . here is no evidence that prior to the time when the detectives first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws.

The same state of the record led the Eighth Circuit to overturn a conviction for selling morphine in *Butts v. United States*, 279 Fed. 38, 18 A.L.R. 143 (C.A. 8, 1921), where it was said:

> There was ample, if not conclusive evidence . . . . that . . . . defendant had never committed any such offense as the officers of the government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by his testimony. There is no evidence that he had ever contemplated, much less intended to sell any morphine. He had never done so.

In *Casey v. United States*, 276 U.S. 413, 72 L.Ed. 632, 48 S.Ct. 373 (1928), overruled on the grounds, *Turner*

v. United States, 393 U.S. 398, 24 L.Ed.2d 610, 90 S.Ct. 642 (1970), the Court refused to consider an entrapment defense because it had not been properly raised. However, it noted that had the defense been preserved, it would probably have failed because:

> . . . . there was probable cause to believe Casey was a habitual drug user who had supplied drugs to inmates on prior occasions (and because he) was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course. (*Id.* at 419).

In *United States v. Dawson*, *supra*, the Eighth Circuit itself said that the Government would need to suspect a crime was underway before targeting a subject for investigation.

Two recent opinions also indicate that the Circuit Courts retain a concern over the manner in which subjects are selected for inclusion in Government undercover operations. *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984) affirmed the conviction of a state court judge on bribery charges but the court condemned indiscriminate Government fishing expeditions and warned that the Government must have a reasonable basis in fact before focusing an undercover operation on a subject.

So did the Ninth Circuit on *United States v. Luttrell*, 889 F.2d 806 (C.A. 9, 1989) rehearing en banc granted 906 F.2d 1384 (1990):

> We think police offiers violate constitutional norms, when without reasoned grounds, they approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct. . . . The principle that persons who are scrupulously conforming their conduct to the requirements if the law should not be made the objects of highly intrusive, random police investigations is an important ingredient of our liberty. We see substantial mis-

> chief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals who, to all reasonable appearances are minding their own business.

2. However, on rehearing before the Eighth Circuit sitting en banc, Judge Heaney's cautious approach was detonated by an opinion with explosive constitutional potential. The heart of the Eighth Circuit's en banc opinion begins:

> In this circuit we review the government's involvement in undercover investigations under due process principles. . . . . (Citations omitted).
>
> Due process limitations 'come into play only when the government activity in question violates some protected right of the defendant.' *Hampton v. United States*, 425 U.S. 484, 490 (1976) (emphasis omitted).

The language within the quotation marks is from the plurality opinion in *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976). In *Hampton*, petitioner admitted he was predisposed to sell heroin to an undercover DEA agent.

At his trial, however, Hampton testified that Hutton, a DEA informer, had proposed they sell counterfeit heroin to gullible acquaintances. He contended that Hutton had furnished him the supposedly counterfeit drug, which turned out to be the real thing. He requested an entrapment instruction which stated in part:

> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

The instruction was refused, and the Eighth Circuit affirmed, relying on *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973).

On certiorari to the Eighth Circuit, the Supreme Court affirmed. Three judges were of the opinion that:

> (In *Russell*) We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established. . . .
>
> The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, is solely in the defense of entrapment. As noted, petitioner's *conceded predisposition* (emphasis supplied) rendered this defense unavailable to him.
>
> To sustain petitioner's contention here would run directly contrary to our statement in Russell that the defense is not intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, *subject* to *applicable* constitutional and statutory limitations and to *judicially fashioned rules* to *enforce those limitations*" (emphasis supplied).
>
> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government Activity in question violates some protected right of the *defendant*. (emphasis in opinion). Here, as we have noted, the police, Government informer, and the defendant acted in concert with one another. If the result of the governmental activity is "to implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . .," *Sorrells*, at 442, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249, the defendant is protected by the defense of entrapment.

Two judges concurring in the result were of the opinion that neither the difficulties which attend the notion that due process of law can be embodied in fixed rules

nor the practicalities of combating the narcotics traffic required the adoption of a rule which would never prevent the conviction of a predisposed petitioner. The concurring justices also said:

> The plurality's use of the 'chancellor's foot' passage from *Russell*, ante at 490, 48 L.Ed.2d 119, may suggest that it would also forclose reliance on our supervising power to bar conviction of a predisposed defendant because of outrageous police conduct. Again, I do not understand Russell to have gone so far. There we indicted only that we should be extremely reluctant to invoke the supervising power in cases of this kind because that power does not give the "federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it does not approve."

Three other justices dissented, taking the view first, that ~~the~~ focus of the entrapment defense "is not on the properties and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of Governmental power.' . . ." *Russell*, 36 L.Ed.2d at 378; and second, that even taking a "subjective" approach to the defense of entrapment, "the police activity in this case was beyond permissible limits." *Hampton*, 48 L.Ed.2d at 123.

Since *Hampton*, the Circuit Courts have adopted a defense of "outrageous government conduct" distinct from entrapment taken from the concurrence and based upon the Fifth Amendment and the supervisory power. Anno 97 A.L.R. Fed. 273 (1990). However, "a delineation of the defense, and in particular, its relationship to the entrapment defense, remains, 'at best elusive'" *United States v. Driscoll*, 852 F.2d 84 (C.A. 3rd, 1988) quoting *United States v. Janotti*, 673 F.2d 578 (C.A. 3rd, 1982).

This case clearly demonstrates the difficulty which lower courts have with the relationship of a due process

defense to entrapment. In the first entrapment case considered by the Court, *Sorrells v. United States*, *supra*, the Court declared that the entrapment defense was available to the accused not on constitutional grounds but as a matter of statutory construction. Sorrells rejected Circuit Court opinions which placed the grounds of entrapment on "public policy," e.g. *Butts v. United States*, 273 Fed. 35 (C.A. 8, 1921) and estoppel e.g. *Newman v. United States*, 279 Fed. 131 (C.A. 4, 1925). The majority opinion by Chief Justice Hughes states:

> Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. . . . We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement would be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to link them to its commission and punish them. We are not forced by the letter to do violence to the spirit and purpose of this statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar prosecution. If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once 'inconsistent with that policy and abhorrent to the sense of justice.' This view does not derogate from the authority of the court to deal appropriately with abuses of its processes and it obviates the objection to the exercise by the court of a

> dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute.

Mr. Justice Roberts, concurring, thought that the judgment should be reversed with instructions to quash the indictment. In his view, the issue was always one of law for the court. He said:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents.

In *Sherman v. United States, supra,* the Court held that the facts established an entrapment of the petitioner as a matter of law. The majority opinion notes that it had been suggested that, "we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells v. United States,* . . ." 2 L.Ed 853, 854. The Court declined this approach:

> Not only was this rejected by the Court in Sorrells, but where the issue has been presented to them, the Courts of Appeal have since Sorrells unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury. . . . (*Id.* at 854).

In *United States v. Russell,* 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973), the Court was again asked to reconsider the theory of entrapment. *Id.* at 36 L.Ed.2d 372. Like Hampton, Russell admitted that he was predisposed and that traditional entrapment, where the Government creates the criminal enterprise, "plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attemped," (*Sherman* at 2 L.Ed.2d 853) did not apply. Instead, he argued that the level of the Government involvement in the manufacture of methamphetamine was

so high that a criminal prosecution for the drug's manufacture violated the fundamental principles of due process. He claimed that the same factors which led the Court to apply the exclusionary rule to illegal searches and seizures and confessions should bar his conviction.

The Court rejected this argument. Mr. Justice Rehnquist, writing for the majority, pointed out that the situations which gave rise to the exclusionary rule were grounded on the Government's failure to observe its own laws. He noted that the Government agent who furnished some of the pheyl-2-propanone which Russell used to manufacture methamphetamine "violated no independent constitutional right of the respondent(,) . . . Nor . . . any federal statute or rule or committed any crime in infiltrating the respondent's drug enterprise." *Id.* at 36 L.Ed.2d 373.

Russell also asked the Court, "as an alternative to his constitutional argument that we broaden the nonconstitutional defense of entrapment. . . ." *Id.* at 36 L.Ed.2d 375. The Court said:

> We are content to leave the matter where it was left by the court in Sherman.
>
> 'The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." '

Thus, the Eighth Circuit's en banc opinion steps off smartly on the wrong foot. Entrapment is not a constitu-

tional defense. It is a defense implied from the intention of Congress not to sanction the punishment of crimes created by over zealous federal authorities. In *Sorrells*, *Sherman*, *Russell* and *Hampton*, dissents advocated a due process rationale for the defense but that view has been expressly renounced four times. The cases cited in the en banc opinion as holding, "we review the government's involvement in undercover operations under due process principles," all say either expressly or impliedly that the Government undercover operations may be reviewed both under entrapment principles and due process—supervisory principles.

Having switched the theory of entrapment from statute to constitution, the Eighth Circuit borrows the *Hampton* plurality's language that, "the Fifth Amendment come(s) into play only when the Government activity in question violates some protected right of defendant." The Eighth Circuit ignores the sentence after next in the *Hampton* plurality opinion, "If the result of government activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission. . .' *Sorrells*, *supra*, at 442, . . . the defendant is protected. . . ." So defendant is protected by a judicially fashioned rule to enforce a statutory limitation.

Then the opinion says, "Jacobson has no constitutional right to be free of investigation." That merely begs the question because it announces the conclusion that everyone is always subject to investigation at any time for no reason. It holds that even though the Government knew that Jacobson had committed no crime, was not planning to commit one and was not engaged in ongoing criminal activity, and even though Justice Department regulations and Postal Service guidelines indicated that Jacobson should be left alone, the authorities nevertheless could properly continue to entice him to violate the law because

he is always subject to investigation.[2] This rule means the end of the entrapment defense because it focuses solely on the Government's right to investigate and denies the citizen protection from Government activity which implants in the mind of an innocent person the disposition to commit the alleged offense and induces him to commit it.

The en banc opinion then goes on to say that: "Jacobson does not claim the government's decision to investigate him deprived him of any right secured him by the constitution. Nevertheless, Jacobson borrows from the rule of particularized suspicion that governs investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 27 (1968). There is no constitutional basis for this borrowing since the Government's decision to investigate Jacobson did not encroach on Jacobson's 'right to personal security.'"

This is strange and frightening reasoning. Neither petitioner nor Judge Heaney borrowed from *Terry*. The borrowing was from the Attorney General's Guidelines, the Postal Inspector's own criteria for subjects to be included in Project Looking Glass and prior Supreme Court and Circuit Court opinions indicating that the Government must have some reasonable suspicion or cause to conclude that a subject has committed, is committing or is likely to commit a crime before he may be targeted for undercover solicitation to engage in criminal activity.

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[2] The Eighth Circuit's en banc suggestion that Jacobson corresponded with "another adult who shared his interest in child erotics" is simply not sustained by any evidence. 916 F.2d 467 (C.A. 8, 1990).

CONCLUSION

Judge Heaney's rule requiring reasonable suspicion that a similar crime has been committed or is likely to be committed in the future before targeting subjects for intruisive undercover operations is about as clear and simple as any that could be announced. It avoids the exercise by the court of a "dispensing power." It leaves the law pretty much where it was left by *Sorrells* and *Sherman*. It provides suitable guidance for law enforcement officials based upon administrative regulations they have imposed upon themselves. It answers a question these officials need answered by the judiciary, that is, how is the government to know when it may employ undercover operations against specific individuals?

The en banc opinion, however, turns entrapment on its head. It says entrapment is a constitutional defense, it must be analyzed under due process principles. Due process can never avail, however, because "no one has a constitutional right to be free from investigation" even if there is no reason to investigate.

All that petitioner asked the Eighth Circuit to do was articulate a judicially fashioned rule to enforce a previously announced statutory limitation upon the Government's execution of the federal criminal laws.

All petitioner desired was an ennunciation of the common thread running through entrapment cases similar to his own. Judge Heaney, drawing on language of long established precedent and government regulations, gave it to him.

The Eighth Circuit's en banc opinion not only obliterates a rational element of the entrapment defense, it upsets the law of the entire entrapment area, blending the worst from Supreme Court minority and plurality opinions to encapsulate a dangerous idea that could lead to completely uncontrolled Government undercover investigations.

The Eighth Circuit has decided important questions of federal law in a way which conflicts with applicable decisions of this Court. It has decided important questions about the entrapment and "outrageous government conduct" defenses which have not been, but should be, settled by the Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-2097NE

UNITED STATES OF AMERICA,
Appellee,

v.

KEITH M. JACOBSON,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: May 17, 1990

Filed: October 15, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, En Banc.

FAGG, Circuit Judge.

A jury convicted Keith M. Jacobson of knowingly receiving through the mails sexually explicit material de-

picting a minor. *See* 18 U.S.C. § 2252(a)(2) (Supp. V 1987). Jacobson appeals, and we affirm.

When police searched a California pornography bookstore, they discovered Jacobson's name on the bookstore's mailing list. Jacobson had ordered three items from the bookstore, two magazines featuring photos of nude adolescent boys and a brochure listing stores in the United States and Europe selling sexually explicit materials. Posing as a member of a hedonist organization, a postal inspector mailed Jacobson a sexual attitude survey and a membership application. Jacobson paid the membership fee to receive a quarterly newsletter from the organization and returned the survey expressing his preference for preteen sex. Later, a postal inspector mailed Jacobson another survey. Jacobson responded positively, "Please feel free to send me more information. I am interested in teenage sexuality." The postal inspector then mailed Jacobson a list of pen pals with similar sexual interests, and Jacobson began corresponding with pen pal Carl Long, the undercover identity of a postal inspector. Jacobson sent Carl Long a newspaper for homosexuals and two letters. Another postal inspector sent Jacobson a letter inviting him to order a child pornography catalogue. Jacobson requested the catalogue and then ordered *Boys Who Love Boys*, a magazine advertised in the catalogue. The catalogue described *Boys Who Love Boys* as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Jacobson also ordered a set of sexually explicit photographs of young boys from another brochure a customs service agent mailed him. The photographs were never delivered to Jacobson. Following a controlled delivery of the magazine, postal inspectors arrested Jacobson when they searched his home and found *Boys Who Love Boys*.

All told, the postal inspectors mailed Jacobson two sexual attitude surveys, seven letters measuring his appetite

for child pornography, and two sex catalogues. Jacobson responded with interest on eight occasions.

On appeal, Jacobson contends the government cannot begin an undercover investigation of a suspected person unless the government has reasonable suspicion based on articulable facts that the suspected person is predisposed to criminal activity. Although Jacobson did not raise this legal issue in the district court, both the government and Jacobson were given an opportunity to brief and argue the issue before the court en banc. We thus proceed on the premise that this issue is properly before us. *In re Modern Textile*, 900 F.2d 1184, 1191 (8th Cir. 1990).

Apart from any question of whether the government's investigatory conduct deprived Jacobson of due process of law, Jacobson contends we should bar the government from obtaining a conviction in his case because the government did not have reasonable suspicion of wrongdoing on his part before targeting him for an undercover investigation. Jacobson argues this bar should apply even when the character of the government's investigation is not outrageous. We disagree.

In this circuit, we review the government's involvement in undercover investigations under due process principles. *United States v. Irving*, 827 F.2d 390, 393 (8th Cir. 1987) (per curiam). The same is true of other courts of appeals. *See United States v. Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989); *United States v. Driscoll*, 852 F.2d 84, 86-87 (3d Cir. 1988); *United States v. Jenrette*, 744 F.2d 817, 823-24 & n.13 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); *United States v. Gamble*, 737 F.2d 853, 856-60 (10th Cir. 1984); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980).

Due process limitations "come into play only when the [g]overnment activity in question violates some protected right of the defendant." *Hampton v. United States*, 425

U.S. 484, 490 (1976) (emphasis omitted). Jacobson has no constitutional right to be free of investigation. *United States v. Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990), *petition for cert. filed*, No. 89-7764 (June 13, 1990). Indeed, Jacobson does not claim the government's decision to investigate him deprived him of any right secured by the constitution. Nevertheless, Jacobson borrows from the rule of particularized suspicion that governs investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) to narrow the government's power to initiate undercover investigations. There is no constitutional basis for this borrowing since the government's decision to investigate Jacobson did not encroach on Jacobson's "right to personal security." *Id.* at 9. Jacobson's demand for particularized suspicion runs against the grain "of the post-*Hampton* cases decided by the courts of appeals [holding] that due process grants wide leeway to law enforcement agen[ts] in their investigation of crime." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983); *see also Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring).

We thus join with the courts of appeals that hold the constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation. *See Jenrette*, 744 F.2d at 824 & n.13; *Gamble*, 737 F.2d at 860; *United States v. Thoma*, 726 F.2d 1191, 1198-99 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *Myers*, 635 F.2d at 941; *see also United States v. Steinhorn*, 739 F. Supp. 268 (D. Md. 1990). *But see United States v. Luttrell*, 889 F.2d 806, 812-14 (9th Cir. 1989) (constitutional norms require reasoned grounds for undercover investigations), *reh'g en banc granted*, 906 F.2d 1384 (1990). To hold otherwise would give the federal judiciary an unauthorized "veto over law enforcement practices of which it [does] not approve." *United States v. Russell*, 411 U.S. 423, 435 (1973); *see also United States v. Lovasco*, 431 U.S. 783, 790 (1977) (judges are

not free to impose their personal notions of fairness on law enforcement officers under the guise of due process). In our view, when the government's investigatory conduct does not offend due process, the mere fact the undercover investigation is started without reasonable suspicion "does not bar the conviction of those who rise to its bait." *Jannotti*, 673 F.2d at 609.

Jacobson next contends the government's investigatory conduct was outrageous and violated his due process rights. This contention is without merit. We recognize due process bars the government from invoking judicial process to obtain a conviction when the investigatory conduct of law enforcement agents is outrageous. *Gunderson v. Schlueter*, 904 F.2d 407, 410-11 (8th Cir. 1990) (citing *Hampton*, 425 U.S. at 492-95 (Powell, J., concurring); *Russell*, 411 U.S. at 431-32). Because the government may go a long way in concert with the investigated person without violating due process, *United States v. Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989) (per curiam), the level of outrageousness needed to prove a due process violation "is quite high," *Gunderson*, 904 F.2d at 410. Indeed, the government's behavior must shock the conscience of the court. *Id.* (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

We simply cannot characterize the government's conduct in Jacobson's case as outrageous. Having discovered Jacobson's name on a pornographer's mailing list, the government pursued its investigation over a period of twenty-nine months by mailing surveys, letters, and catalogues to Jacobson. Jacobson responded, remitting a membership fee, requesting more information, corresponding with another adult sharing his interest in child erotica, and finally ordering obscene magazines and photographs depicting "young boys in sex action fun." The postal inspectors did not apply extraordinary pressure on Jacobson. The inspectors merely invited Jacobson to purchase pornographic material through the mail. *See Kaminski*,

703 F.2d at 1009 (the offer of reasonable inducements is a proper means of investigation). Unlike face-to-face contacts, Jacobson easily could have ignored the contents of the mailings if he was not interested in them. Similar undercover operations aimed at child pornography collectors "have withstood the constitutional challenge [Jacobson] now raises." *Musslyn*, 865 F.2d at 947 (citations omitted).

Jacobson also contends he was entrapped as a matter of law. We cannot agree. The jury rejected Jacobson's entrapment defense. Jacobson argues, however, the evidence clearly shows entrapment: the postal inspectors originated the criminal plan, implanted the disposition to purchase child pornography into Jacobson's otherwise innocent mind, and Jacobson ordered the illegal magazine at their behest. *See United States v. Pfeffer*, 901 F.2d 654, 656 (8th Cir. 1990). We view the evidence in the light most favorable to the government in deciding whether there is a jury issue on entrapment, *id.*, and having done so, we conclude this is not a case in which the government was a manufacturer rather than a detector of crime.

Entrapment is established as a matter of law only when the absence of defendant's predisposition to commit a crime is apparent from the uncontradicted evidence. *Thoma*, 726 F.2d at 1197. Having considered the factors that bear on a criminal defendant's predisposition, *id.*, we are convinced the district court properly submitted the question of Jacobson's entrapment to the jury. The government presented ample evidence that the postal inspectors only provided Jacobson with opportunities to purchase child pornography and renewed their efforts from time to time as Jacobson responded to their solicitations. Indeed, the panel's opinion recognized Jacobson's response to a survey mailed to him by the postal inspectors "indicated a predisposition to receive through the mails sexually explicit materials depicting children,"

United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir. 1990), and "justif[ied] the decision to offer Jacobson the opportunity to purchase illegal materials through the mail," *id.* at 1001. Jacobson was not entrapped as a matter of law.

Finally, Jacobson contends the district court committed error in admitting certain evidence and in failing properly to instruct the jury. We have carefully considered these contentions and find them without merit.

We thus affirm Jacobson's conviction.

LAY, Chief Judge, dissenting

In *Hampton v. United States*, 425 U.S. 484 (1975), the Supreme Court recognized that "the entrapment defense 'focus[es] on the intent or predisposition of the defendant to commit the crime,' rather than upon the conduct of the Government's agents." *Id.* at 488 (quoting *United States v. Russell*, 411 U.S. 423, 429 (1973)); *see also United States v. Thoma*, 726 F.2d 1191, 1197 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984) (entrapment is established as a matter of law if the uncontroverted evidence indicates that a defendant was not predisposed to commit a crime).

In the present case, it is clear the government entrapped Jacobson as a matter of law. Jacobson is a fifty-seven year old farmer from Newman Grove, Nebraska. Prior to his conviction, Jacobson's criminal record reflected only a 1958 conviction for driving while under the influence.

On February 4, 1984, Jacobson *lawfully* ordered from Dennis Odom, a California businessman, two nudist magazines and a brochure. Several months later, the government obtained Odom's mailing list, which included Jacobson's name. Although the government possessed no information that Jacobson had previously purchased obscene materials, he nevertheless became the target of five undercover sting operations. Over a period of two and one-half

years, the government, using as a subterfuge various fictitious organizations, repeatedly solicited Jacobson through the mail to purchase illegal pornography. Jacobson finally succumbed to the government's pressure by ordering "Boys Who Love Boys," a pornographic magazine.

From the uncontroverted facts in this case, it is readily apparent that Jacobson was not predisposed to commit the crime of receiving through the mails sexually explicit materials depicting a minor. The government contends that Jacobson had the requisite predisposition based on his answer to a survey that indicated he was interested in pre-teen sex magazines. Jacobson's response merely demonstrates that the government set out to entrap him because he had legally ordered two magazines that later proved to be obscene. Based on Jacobson's prior history, it is not clear that he would knowingly and voluntarily violate the law by purchasing obscene materials. The evidence fails to show that Jacobson was predisposed to commit the crime of which he was ultimately convicted.

I find the government's conduct in this case to be reprehensible. The government invested considerable time and money to prosecute a man who never would have committed a crime but for the government's encouragement. The government should not concentrate its efforts on incriminating innocent individuals; rather it should strive to suppress criminal behavior.

HEANEY, Senior Circuit Judge, dissenting.

Keith Jacobson's conviction should be set aside. Prior to instituting the sting, the Postal Service possessed no evidence giving rise to a reasonable suspicion that Jacobson, a 57-year old, law-abiding, Nebraska farmer with a 20-year record of honorable service in the armed services of the United States, had violated child obscenity laws in the past or was likely to do so in the future. The targeting of Jacobson violated federal law enforcement guidelines requiring an investigative agency to have a reasonable suspicion before investigating an individual that the prospective target is engaging, has engaged, or is likely to engage in illegal activities of a similar type.

Jacobson's conviction should also be set aside because the conduct of the Postal Service was outrageous, not only for the reason previously stated, but also because the Service made at least ten mailings to Jacobson over a period of 27 months, January 1985 to May 1987, before he succumbed to its solicitations to order an illegal magazine.

Had the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children.

The majority is concerned about unduly limiting the government's investigation of crime. I cannot accept this view, particularly because the government itself rejects the tactics used here as unacceptable.

An argument can, of course, be made that the administrative agency itself should enforce the policy against the targeting of individuals unless a reasonable suspicion exists for so doing, and well it should. The Postal Service should have done so here by vetoing the local decision to pursue Jacobson. But when an important constitutional right is involved, we should not shrink from requiring that a federal policy be followed. Of course, Jacobson has no right to be free from investigation; all of use, judges included, have no such right. But here the government unlawfully undertook to induce him to violate the law with repeated solicitations to buy obscene materials. Before commencing the sting, the government had no evidence that Jacobson had ever purchased or possessed such materials or desired to do so.

Jacobson, a 57-year old resident of Newman Grove, Nebraska, currently lives on his family farm and supports his parents. He enlisted in the United States Navy in 1951. During his tour of duty, he served on a destroyer in the Korean theater. He was honorably discharged in 1955. He enlisted in the United States Army in 1958. He served in the Korean and European theaters and was decorated for his service. He retired from the Army in 1974.

On returning to Nebraska, Jacobson became a school bus driver and served in that capacity for ten years. Upon his retirement, he received a certificate of commendation from the Board of Education. There is not a hint in his 20-year service record of participation in illegal or improper sexual activities, and his record as a school bus driver is unblemished. He has no criminal history, with the exception of a conviction for driving while intoxicated in 1958.

On February 4, 1984, Jacobson ordered two magazines and a brochure from Dennis Odom, who did business as the Electric Moon in San Diego, California. On May 11, 1984, the government executed a search warrant on the Electric Moon business premises and seized the business's mailing list. Jacobson's name and address were on that mailing list.

The two magazines Jacobson ordered were "Bare Boys I" and "Bare Boys II." They were nudist magazines, the receipt of which did not violate any law. Receipts for his order were found in Blue Moon's files. The government had no information at the time it instituted the sting that Jacobson had purchased obscene materials through the mails or that he produced child pornography or that he was predisposed to do either.

Nevertheless, the government made Jacobson the target of five undercover sting operations involving at least twelve separate mail solicitations over a period of two

and one-half years. Jacobson answered a survey sent to him during the first undercover operation. In his response, he indicated an interest in material about preteen sex. The government, in the guise of five separate, fictitious organizations and one fictitious individual, contacted Jacobson through the mail eleven more times before he finally ordered "Boys Who Love Boys," an admittedly obscene magazine. After sending him this publication, government agents arrested Jacobson and searched his home. No other illegal materials were found.

I adhere to the views I expressed in our panel opinion that Jacobson's Electric Moon purchase did not evidence a predisposition to purchase illegal child pornography and thus did not give rise to a reasonable suspicion that Jacobson had committed a crime in the past or was likely to commit one in the future. I continue to believe that the government must have such a reasonable suspicion before instituting an undercover sting directed at an individual, *see United States v. Luttrell*, 889 F.2d 806, 813 (9th Cir. 1989), *reh'g en banc granted*, 906 F.2d 1384 (9th Cir. July 12, 1990), and that because no such suspicion existed in this case, Jacobson's conviction must be set aside. Additionally, I believe that the Postal Service's repeated solicitation of Jacobson to purchase illegal pornography constituted conduct so outrageous and offensive that a conviction arising therefrom offends due process principles. *See United States v. Russell*, 411 U.S. 423, 431-32 (1973).

The requirement that law enforcement officials have a reasonable suspicion of actual or potential criminal behavior before targeting an individual for an undercover investigation is consistent with the investigative policies of the United States Attorney General, the FBI, and the United States Postal Service. The Attorney General's guidelines on FBI undercover operations provide that undercover operations offering an inducement to illegal activities are not to be approved unless:

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Office of the Attorney General, Attorney General's Guidelines on FBI Undercover Operations 16 (Dec. 31, 1980), *reprinted in Law Enforcement Undercover Activities: Hearings before the Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, U.S. Senate, 97th Cong., 2d Sess. 86, 101 (1982) [hereinafter *Senate Hearings*]; *see also* Office of the Attorney General, Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations 1 (Dec. 2, 1980), *reprinted in Senate Hearings, supra*, at 121 ("A key principle underlying these practices, and reflected in these Guidelines, is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose.").[1]

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[1] William H. Webster, then director of the FBI, endorsed a reasonable suspicion standard for undercover investigations in his testimony during the Senate hearings on Justice Department undercover operations:

> [O]ne of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts or circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred, is occurring, or is likely to occur. In other words, a reasonable cause provision.

Senate Hearings, supra, at 1041 (statement of Hon. William H. Webster); *see also id.* at 1055 ("We have come pretty close to it in the investigative guidelines that are already there, if we are talking about a reasonable suspicion basis. I have no problem with requiring an articulation of the reasons. I think we are doing that now, and we will certainly do it in the future.").

Additionally, Raymond J. Mack, an inspector with the United States Postal Inspection Service, testified at Jacobson's trial that the purpose of Postal Service testing programs was "to bring us into contact with individuals that have committed some type of criminal offense or [are] in the act of committing a criminal offense." Trial transcript at 92. To that end, according to Mack, Postal Inspection Service sting operations were to be directed only at those individuals whose names appeared independently on at least two lists acquired from the following sources: a mailing lists seized by postal inspectors in separate child pornography investigations; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI; investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs. Trial transcript at 95, 97, 146-47. Calvin M. Comfort, a prohibited mailing specialist with the Postal Inspection Service, acknowledged at trial that the sole independent source on which Jacobson's name appeared was the Electric Moon mailing list. Trial transcript at 346.

The majority cites five cases from other circuits as holding that "the Constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation" of a particular individual. One of these cases appears to be on point. *See United States v. Gamble*, 737 F.2d 853 (10th Cir. 1984). In that case, the court allowed the defendant's conviction

to stand despite its finding that government agents fabricated criminal schemes to enmesh a black doctor with no criminal record about whom the agents had "no apparent hint of a predisposition to criminal activity." *Id.* at 860.

In *United States v. Thoma*, 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984), the court acknowledged that the government had a good faith basis for investigating the defendant. *Id.* at 1198. Its subsequent statement that such a basis is not a constitutional prerequisite to an undercover investigation is therefore dictum. *See id.* at 1198-99. In *United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982), an attorney with a "proven ability to enlist corrupt politicians" provided the government with the defendants' names. *Id.* at 609. The Third Circuit concluded that this source "provided the government with a reasonable basis for the initiation of the bribe offers" it made to the defendants. *Id.* In an alternative holding, the court stated: "Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without *probable cause* does not bar the conviction of those who rise to its bait." *Id.* (emphasis added). The *Jannotti* court expressed no opinion as to whether an investigation commenced without a degree of suspicion less than that required for probable cause, or with no suspicion at all, would offend due process.

In *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), the District of Columbia Circuit rejected the contention of a former United States congressman that the FBI's targeting of him in the ABSCAM sting without a reasonable suspicion of criminal behavior violated due process. The court relied on *United State v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983), an earlier appeal in another ABSCAM prosecution. The *Kelly* court stated:

> [B]ecause *dishonest public officials*, responsive more to money than to their obligations to the nation, may cause grave harm to our society, we recognize the need for law enforcement efforts to detect *official corruption*. Furthermore, such corruption is "that type of elusive, difficult to detect, covert crime which may justify Government infiltration and undercover activities."

Id. at 1473-74 (emphasis added) (citation omitted). The court considered the "genuine need to detect corrupt public officials as well as the difficulties inherent in doing so" to conclude that the FBI's targeting of Congressman Kelly did not constitute intolerable government conduct. *Id.* at 1474. The *Jenrette* court recognized that *Kelly*'s holding was premised on law enforcement needs in detecting official corruption, observing that "other courts of appeal have considered and rejected the contention that the government must have a reasonable suspicion of wrongdoing before offering a bribe to a *public official*." 744 F.2d at 824 n. 13 (emphasis added) (citations omitted).

Similarly, in *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), the Second Circuit rejected the argument that the Constitution requires "The Executive Branch [to] demonstrate some basis of suspicion (short of probable cause) before deciding to make any *Member of Congress* the target of a sting." *Id.* at 941 (emphasis added). The court based its rejection of such a requirement, in part, on the limitations the Speech or Debate Clause places on the conduct of a congressman that may be made the basis of a prosecution and the evidence that may be used against him. *Id.*

Two factors motivating the holdings in *Jenrette* and *Myers*, the need to detect official corruption and the constitutional safeguards available to congressmen-targets of the ABSCAM sting, are absent from the government's

targeting and prosecution of Jacobson. Thus, we need not decided in this case whether we should follow them.

Additionally, I believe the conduct of the Postal Service's sting operations involving Jacobson was so outrageous that the prosecution arising therefrom violates Jacobson's due process rights. Once the Postal Service obtained Jacobson's name from the Electric Moon mailing list, its operatives commenced a two and one-half year campaign of deceptive mail solicitations whose sole object was to induce Jacobson to commit a crime "merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs." *United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978).

The Postal Service first contacted Jacobson through a sting operation called "The American Hedonist Society," "a private, members only society for those who adhere to the doctrine that pleasure and happiness is the sole good in life." Government Exhibit 7. Jacobson completed the purportedly confidential questionnaire, indicating an interest in preteen sexual material. The Postal Service then "enrolled" Jacobson in the American Hedonist Society and began sending him the Society's newsletters, which advertised sexually explicit materials for sale. Jacobson never ordered any of the advertised materials.

The Postal Service then approached Jacobson through "Midlands Data Research," "a small, old established firm in Lincoln, Nebraska" which purported to conduct "consumer surveys on a variety of subjects." Government Exhibit 8. The mailing included a questionnaire and a letter which stated: "If you believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [sic] age, we would like to hear from you." *Id.* Jacobson responded that Midlands Data Research should feel free to send him further information, but did not answer the questionnaire.

Jacobson's failure to complete the questionnaire prompted the Postal Service to send another letter and questionnaire from the "Heartland Institute for a New Tomorrow" (HINT). HINT described itself as a lobbying organization "founded to protect and promote sexual freedom and freedom of choice" by urging the repeal of "arbitrarily imposed legislative sanctions restricting *your* sexual freedom." Exhibit 102. The HINT letter asked Jacobson to reconsider his refusal to participate in the Midlands Data Research survey. Jacobson responded by completing the HINT questionnaire.

The Postal Service next sent Jacobson a letter from the director of HINT, which stated:

> We at HINT have computer matched your response with the responses of others who have similarly completed our survey questionnaire. Enclosed with this correspondence you will find a list of persons with backgrounds and interests similar to yours. Won't you take a little time in the interest of sexual freedom and write to one of the persons on the list? It's the only way to overcome the pressures of society which come to bear on each of us.
>
> We welcome any comments or suggestions you might have concerning HINT or its programs.

Defendant's Exhibit 113. Jacobson neither responded to this letter nor wrote to any of the individuals on the accompanying list.

The Postal Service next used a technique known as "mirroring" to acquire further information from Jacobson. A postal inspector posing as "Carl Long," a supporter of HINT with interests similar to Jacobson's, wrote to Jacobson stating that he collected erotic literature and wished to corespond with him. Government Exhibit 11; trial transcript at 342. Jacobson replied that he too collected erotica and would be willing to correspond. Government Exhibit 12. Long responded, inquiring about Jacobson's interest in amateur sex videos.

Government Exhibit 13. Jacobson again wrote to Long, noting that amateur videotapes were difficult to acquire, naming several film sources, and stating that he preferred "good looking young guys (in their late teens and early 20's)." Government Exhibit 14. Jacobson failed to answer a third letter from Long.

After Jacobson ceased writing to Long, the Postal Service again contacted Jacobson, posing as the "Far Eastern Trading Company Ltd." of Hong Kong and "Produit Outaouais" of Quebec, two mail-order retailers of erotica. After receiving a second mail solicitation, Jacobson ordered "Boys Who Love Boys" from the Far Eastern Trading Company. When the Postal Service delivered the magazine to Jacobson, he was arrested, charged with, and convicted of knowingly receiving through the mails sexually explicit material depicting a minor.

Jacobson's conviction thus was the culmination of the Postal Service's two and one-half year campaign to induce this heretofore law-abiding farmer to violate the obscenity laws. Posing as an imaginative variety of spurious organizations and individuals, all apparently legitimate, the Postal Service first engaged Jacobson in a dialogue about erotica, then presented him with a series of opportunities to purchase government-compiled pornography through the mails. When Jacobson failed to complete a Postal Service questionnaire, the Postal Service sent him another and urged him to reconsider responding. When Jacobson ceased corresponding with a Postal Service "pen pal," the Postal Service renewed its approach under the quise of two fictitious purveyors of erotica who assured Jacobson that their mailings would not run afoul of United States Customs.

In its pursuit of Jacobson, I believe the Postal Service's direct and continuous involvement in the creation and maintenance of opportunities for criminal activity rises to that demonstrable level of outrageousness which violates due process. *See Hampton v. United States*, 425

U.S. 484, 495 n.7 (1976) (Powell, J., concurring); *see also Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) ("When the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative.").

Moreover, all the time, effort, expense, and ingenuity invested in apprehending Jacobson yielded only a single conviction of a single individual for the receipt of a single obscene magazine that would never have entered the United States mails had the Postal Service not deposited it there in the first place. The investigation of Jacobson produced no new evidence against existing pornography producers or purchasers and did nothing to further the goal of preventing the sexual exploitation of minors. As the Seventh Circuit has observed:

> If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime.

United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

In my view, the government's investigation and prosecution of Jacobson amounts to the deliberate manufacture of a crime that would never have occurred but for the Postal Service's overzealous efforts to create it. Jacobson's conviction should be reversed. Accordingly, I dissent.

A true copy:

Teste:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2097

UNITED STATES OF AMERICA,
Appellee,
v.
KEITH M. JACOBSON,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: February 14, 1989
Filed: January 12, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

HEANEY, Senior Circuit Judge.

Keith Jacobson was convicted of one count of receiving child pornography through the mails. On appeal, Jacobson argues that he was entrapped as a matter of law because the government failed to show that he was predisposed to commit the crime and that the government's outrageous conduct gave rise to a violation of due process. We overturn the conviction because, before instituting an undercover operation at Jacobson, the government had no evidence giving rise to a reasonable suspicion that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future.

I. BACKGROUND

Keith Jacobson is a fifty-seven year old resident of Newman Grove, Nebraska, currently living on a family farm and supporting his parents. Jacobson served in the Korean and Vietnam Wars, for which he received the Bronze Star and the Army Commendation Medal. He has no criminal history, with the exception of a conviction for driving while intoxicated in 1958.

On February 4, 1984, Jacobson ordered two magazines and a brochure from Dennis Odom, who does business as the Electric Moon in San Diego, California. On May 11, 1984, the government executed a search warrant on the Electric Moon business premises and seized the business' mailing list. Jacobson's name and address were on that mailing list.

The two magazines Jacobson ordered were "Bare Boys I" and "Bare Boys II." They were nudist magazines, the receipt of which did not violate any law. Receipts for his order were found in Blue Moon's files. Jacobson also ordered a brochure in which he failed to order any materials or contact any of the sources listed. The government had no other information at the time that Jacobson was purchasing through the mails or producing child pornography, or that he was predisposed to do either.

Nevertheless, the government made Jacobson the target of five undercover sting operations over a period of two and one-half years. Various postal inspectors surreptitiously contacted Jacobson more than eleven times. Jacobson answered a survey sent to him during the first undercover operation. In his response, he indicated a predisposition to receive through the mails sexually explicit materials depicting children. After several opportunities to purchase such materials under government observation, Jacobson ordered "Boys Who Love Boys," a magazine containing sexually explicit materials depicting minors. After sending him this publication, government agents

arrested Jacobson and searched his home. No other illegal materials were found.

The government indicted Jacobson on September 14, 1987, on one count of receiving through the mails a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct. Jacobson was tried in front of a jury consisting of nine women and three men on April 22, 1988. On April 26, 1988, the jury returned a verdict of guilty. The judge sentenced Jacobson to two years probation and 250 hours of community service.

II. DISCUSSION

Jacobson raises several arguments on appeal, but at the heart of each argument is the assertion that the government lacked a basis for making Jacobson a target of an undercover operation. In response, the government argues that, while his purchase of the two magazines from Electric Moon constituted legal conduct, the purchases evidenced a predisposition to purchase illegal child pornography. Our view is threefold: (1) the Electric Moon purchase was not evidence of predisposition and did not give rise to a reasonable suspicion based on articulable facts that Jacobson had committed a crime in the past or was likely to commit a crime in the future; (2) the government must have reasonable suspicion based on articulable facts before instituting an undercover operation directed at a person; and (3) since the undercover operation was improper, Jacobson's conviction must be set aside because there was no evidence of an intervening act which cured the government's improper conduct.

The government asserts in its brief that the Electric Moon purchase was sufficient evidence of predisposition to justify the institution of an undercover operation against Jacobson. We disagree. In our view, at the time it commenced its undercover operation, the government had no evidence giving rise to a reasonable suspicion that

Jacobson had committed a crime or was about to commit one. This is simply a case where a legal act took place and the government directed an extensive undercover operation at the person who committed the legal act. When an individual engages in legal conduct and no additional or extrinsic evidence exists to give use to a reasonable suspicion of predisposition, the government may not target that individual, no matter how distasteful the lawful conduct may be. Obviously, had the government learned, prior to targeting Jacobson, that he had purchased or had expressed a desire to purchase illegal materials or that he had otherwise engaged in illegal conduct, there would have been sufficient cause to justify the decision to offer Jacobson the opportunity to purchase illegal materials through the mail.

This case is clearly distinguishable from the cases reaching the appellate level cited by the government in its brief. First, the government had received no information that Jacobson was purchasing illegal child pornography through the mails or that he was producing illegal child pornography. *See United States v. Emmert*, 829 F.2d 805, 807 (9th Cir. 1987); *United States v. Irving*, 827 F.2d 390, 391 (8th Cir. 1987); *United States v. Lard*, 734 F.2d 1290, 1292 (8th Cir. 1984); *United States v. Thoma*, 726 F.2d 1191, 1194 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Leja*, 563 F.2d 244, 245 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978). Second, Jacobson had never ordered or advertised for any illegal materials. *See United States v. Rubio*, 834 F.2d 442, 445 (5th Cir. 1987); *United States v. Goodwin*, 674 F. Supp. 1211, 1213 (E.D. Va. 1987), *aff'd*, 854 F.2d 33 (4th Cir. 1988). Third, the government did not inadvertently target Jacobson as a result of pre-existing investigations. *See United States v. Esch*, 832 F.2d 531, 533 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1084 (1988); *United States v. Quinn*, 543 F.2d 640, 643 (8th Cir. 1976). Fourth, there were no independent articulable facts that gave rise to the suspicion

that Jacobson had committed a crime or was likely to commit a crime. *See United States v. Dawson*, 467 F.2d 668, 674 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973).

The government argues that, even if it did not have grounds for initially targeting Jacobson, his actions in response to the targeting indicated that he was predisposed to commit the crime, and his conviction should therefore be confirmed. We cannot agree. To accept this position would be to allow government agents to target entire groups of people without specific justification, hoping to uncover some individual who is predisposed to commit a crime if given enough opportunities to do so. The government must reasonably suspect that a crime has occurred or is likely to occur before targeting an individual. Evidence tending towards a reasonable suspicion obtained during an illegal targeting operation may be used to defend against a claim of entrapment only if received independent of the illegal sting operation. *Cf. Wong Sun v. United States*, 371 U.S. 471 (1963). No such evidence exists in this case.

The government recognized that there must be limits on its power to investigate during its review of the ABSCAM sting operation. During congressional hearings, the Federal Bureau of Investigation (FBI) made clear that it had targeted only those persons who had been identified by a reliable source as predisposed to take or offer a bribe, thus giving rise to a reasonable suspicion that the targeted individuals would commit a crime if offered the opportunity to do so. Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 682, 97th Cong., 2d Sess. 13 (1982).[1]

[1] In each of the ABSCAM cases, reasonable suspicion does appear from the record. *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984); *United States v. Silvestri*, 719 F.2d 577 (2d Cir. 1983); *Ciuzio v. United States*, 718 F.2d 413 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1305 (1984); *Weisz v. United States, id.* (Ciuzio and Weisz were tried together); *Thompson v. United States*, 710 F.2d 915 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 702 (1984); *Williams v. United States*, 705 F.2d 603 (2d Cir.), *cert. denied*, 104 S.Ct. 524 (1984); *Kelly v. United States*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S.Ct. 264 (1983); *Myers v. United States*, 692 F.2d 828 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *Carpentier v. United States*, 689 F.2d 21 (2d Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983); *Alexandro v. United States*, 675 F.2d 34 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); *Jannotti v. United States*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982). Only three of the cases, however, dealt specifically with the requirement of reasonable suspicion. *United States v. Kelly*, 707 F.2d 1460, 1471 (D.C. Cir. 1983) (without deciding whether reasonable suspicion is required, the court found that there was ample suspicion to justify targeting Kelly); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir. 1982) (lack of reasonable suspicion does not offend due process); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir. 1980) (lack of reasonable suspicion does not offend due process or the speech or debate clause).

In our view, reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation. If a particular individual's conduct gives rise to reasonable suspicion, the government may conduct any undercover operation it so desires, as long as it does not give rise to a claim of outrageousness. *United States v. Lard*, 734 F.2d 1290, 1296-97 (8th Cir. 1984). While the use of undercover operations is indispensible to the achievement of effective law enforcement, the potential harms of undercover operations call for the recognition that there must be some limitation on the indiscriminate use of such government targeting.[2]

At the time the government targeted Jacobson, it had no reason to believe that he was likely to commit an act

[2] These potential harms include the creation of crime, the entrapment of innocent persons, the destruction of the reputations of innocent persons, extensive fishing expeditions among innocent citizens, the creation of an air of distrust amongst colleagues and acquaintances and the subjecting of governmet agents to tremendous temptations, dangers and stresses.

which would violate federal obscenity laws. No evidence was subsequently obtained outside of the undercover operation. The evidence that Jacobson was predisposed to commit the crime for which he was convicted is tainted by the illegal targeting. We hold that Jacobson was entrapped as a matter of law. We therefore reverse his conviction and vacate his sentence.

FAGG, Circuit Judge, dissenting.

The panel has declared war on the government's power to initiate undercover investigations. Thus, I dissent.

I take issue with the panel's disinclination to apply the controlling standard of review. This court reviews the government's involvement in undercover investigations under due process principles. *United States v. Irving*, 827 F.2d 390, 393 (8th Cir. 1987) (per curiam). The same is true of other courts of appeals. *See United States v. Luttrell*, 809 F.2d 806, —— (9th Cir. 1989) (suspicionless undercover investigations offend due process); *United States v. Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988) (due process does not require probable cause for an undercover investigation); *United States v. Jenrette*, 744 F.2d 817, 823-24 & n.13 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (due process does not require reasonable suspicion of wrongdoing for an undercover investigation); *United States v. Gamble*, 737 F.2d 853, 856-60 (10th Cir. 1984) (same); *United States v. Myers*, 635 F.2d 932, 841 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) (same).

Instead of deciding whether the government's conduct in formulating, implementing, and enmeshing Jacobson in the investigatory scheme was fundamentally unfair, *Irving*, 827 F.2d at 393, the panel has barred the government from obtaining a conviction because the undercover investigation was initiated without "reasonable suspicion based on articulable facts" that Jacobson had committed or was likely to commit a similar crime, *ante* at 1, 3.

This bar applies even when the overall character of the government's investigation "does not give rise to a claim of outrageousness." *Id.* at 6. In my view, due process does not require an objectively quantified suspicion that approaches the threshold of probable cause. *See Garionis v. Newton*, 827 F.2d 306, 309 (8th Cir. 1987). I believe the government can act on legitimately grounded suspicions without depriving the suspected person of any right secured by the constitution. The panel's demand for particularized suspicion runs against the grain "of the post-*Hampton* cases decided by the courts of appeals [holding] that due process grants wide leeway to law enforcement agents in their investigation of crime." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983); *see also Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring).

In my opinion, the panel has borrowed from the rule of probable cause to arrest, *Garionis*, 827 F.2d at 309, and from the rule of particularized suspicion that governs brief investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 16-19, 21 (1968), for the singular purpose of narrowing the government's power to initiate undercover investigations. Needless to say, law enforcement decisions to conduct undercover investigations are not controlled by fourth amendment doctrine. Furthermore, the terminology that functions as the backbone of the panel's rule "[is] not self-defining [and the terminology] fall[s] short of providing clear guidance dispositive of the myriad factual situations that arise" when the government invokes its investigative powers to penetrate the shadowy world of crime. *See United States v. Cortez*, 449 U.S. 411, 417 (1981). At bottom, the panel's rule-making runs squarely into "the difficulties attending the notion that due process of law can be embodied in fixed rules." *United States v. Russell*, 411 U.S. 423, 431 (1973).

If the panel believes the government has violated due process by embarking on a suspicionless investigation

against Jacobson, it should say so. *Luttrell*, 889 F.2d at ——. Tht record, however, does not support that conclusion. Indeed, on the record presented here the government's undercover investigation fits within the terms of the very rule the panel proposes.

The government possessed well-grounded reasons to believe that an investigation aimed at Jacobson would uncover criminal behavior. *Id.* at ——. Jacobson's name was found in the customer records of a reputed child pornographer. This discovery identified Jacobson as a person who had previously ordered child erotica through the mails. The customer records also disclosed that Jacobson had obtained a brochure outlining the methods of purchasing child pornography. With this information in the hands of experienced postal inspectors, I am at a loss to understand how the panel finds room to "criticize the government for reasonably pursuing available leads" concerning Jacobson's appetite for sexually explicit portrayals of children. *United States v. Hunt*, 749 F.2d 1078, 1087 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). The panel concedes that Jacobson's response to a survey mailed to him by the postal inspectors "indicated a predisposition to receive through the mails sexually explicit materials depicting children," *ante* at 2, and "justif[ied] the decision to offer Jacobson the opportunity to purchase illegal materials through the mail," *id.* at 4.

It seems to me the panel is wearing blinders. This is not a case where the government was in the business of generating new crimes merely for the sake of pressing criminal charges against an individual who was "scrupulously conforming to the requirements of the law." *Luttrell*, 889 F.2d at ——. Jacobson was not targeted in advance. To the contrary, the government had a significant amount of knowledge about Jacobson's shadowy activities, and he was targeted for investigation because of his own voluntary conduct.

What the panel has chosen to ignore in this case is the practical reality that the investigatory process does not deal with hard certainties. Law enforcement officers are entitled to draw inferences, make deductions, and arrive at common sense conclusions about human behavior based on available information and the behavioral patterns of law breakers. *See Cortez*, 449 U.S. at 418-19. The accumulated information must be "seen and weighed not in terms of [judicial post mortems], but as understood by those versed in the field of law enforcement." *Id.* at 418. When the whole picture known to the postal inspectors is viewed in this context, the officers clearly possessed legitimate grounds for their suspicion of Jacobson and for their belief that an undercover approachment of Jacobson would reveal criminal activity. *Id.* at 419. "Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on [Jacobson]." *Id.* Simply stated, the panel is unwilling to acknowledge that it is looking at reasonable police work. *Id.*

Although the normal constitutional and statutory protections of criminal process have always been available to Jacobson, he necessarily wages his legal battle against the government's decision to investigate him as a question of law because the jury has rejected his entrapment defense. This court "may someday be presented with a situation in which the conduct of law enforcement agents [in initiating an undercover investigation] is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, [but Jacobson's case] is distinctly not of that breed." *Russell*, 411 U.S. at 431-32. I thus dissent from the panel's decision to overturn Jacobson's conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2097NE

UNITED STATES OF AMERICA,
Appellee,

vs.

KEITH M. JACOBSEN,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 15, 1990

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 11/06/90

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR 87-0-77

UNITED STATES OF AMERICA

v.

KEITH M. JACOBSON
P.O. Box 57
Newman Grove, NE 68758

JUDGMENT IN A CRIMINAL CASE

[Filed Jul. 1, 1988]

George H. Moyer, Jr., Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) ———, and ☒ not guilty as to count(s) I.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) I.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) N/A.

☐ judgment of acquital as to count(s) ———. The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: receipt of sexually explicit material in violation of Title 18, United States Code, section 2252

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is sentenced to the custody of the Attorney General for a period of imprisonment of three (3) years, however the Court now suspends the sentence of imprisonment and places the defendant on Probation for a period of two (2) years with the following Special Conditions:

1) the defendant shall serve 250 hours of Community Service under the direction of the Probation Office

2) the defendant shall pay the Taxable Cost and the Special Assessment during the term of Probation.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) T as follows:

IT IS FURTHER ORDERED that counts N/A are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

June 30, 1988
Date of Imposition of Sentence

/s/ Lyle E. Strom
Signature of Judicial Officer
LYLE E. STROM
Chief Judge
Name and Title of Judicial Officer

June 30, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR. 87-0-77

UNITED STATES OF AMERICA,
Plaintiff,

v.

KEITH M. JACOBSEN,
Defendant.

VERDICT

We, the jury empaneled to try this cause, find the defendant, Keith M. Jacobsen, guilty as charged in the indictment.

DATED this 26 day of April, 1988.

/s/ Henry C. Hill
Foreperson

(2)

No. 90-1124

In the Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether government agents must reasonably suspect that a person has committed or is likely to commit criminal acts before the agents may conduct an undercover criminal investigation of the individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1124

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-19a) is reported at 916 F.2d 467. The panel opinion of the court of appeals (Pet. App. 20a-29a) is reported at 893 F.2d 999.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of receiving through the mails sexually explicit material depicting a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to two years' probation and 250 hours' community service. A panel of the court of appeals reversed his conviction, but on rehearing the en banc court of appeals affirmed.

1. In June 1987 petitioner received through the mail a magazine depicting young boys engaging in sexual activity. The distributor of the magazine turned out to be an undercover postal inspector, and petitioner was arrested following a controlled delivery of the magazine. Pet. App. 2a.

That delivery was the culmination of a lengthy investigation of petitioner that began in May 1984 when police searched a California pornographic bookstore and discovered petitioner's name on the store's mailing list. In February 1984 petitioner had ordered two magazines that contained photos of nude adolescent boys, as well as a brochure listing other stores that sold sexually explicit magazines. A postal inspector, posing as a member of a hedonist organization, then mailed petitioner a sexual attitude survey and a membership application. In February 1985, petitioner paid the fee to receive a quarterly newsletter from the organization. He also returned the survey, in which he expressed a preference for preteen sex. Pet. App. 2a; Pet. 5-6. In May 1986, Postal Inspector Calvin Comfort mailed petitioner another survey. Although petitioner did not complete the survey, he responded affirmatively, saying that he wished more information and that he was "interested in teenage sexuality." In response, Comfort sent petitioner a list of "pen pals" who supposedly had similar

sexual interests. In reality, each of the names on the list was a pseudonym for Comfort. Posing as "Carl Long," Comfort wrote petitioner in September 1986. Petitioner wrote "Long" twice, one time sending him a newspaper directed to homosexuals. Pet. App. 2a; Pet. 6-8.

In March 1987, a third postal inspector sent petitioner a letter ostensibly from a firm offering sexually explicit materials for sale. Petitioner ordered a catalog and subsequently ordered a magazine entitled, *Boys Who Love Boys*, described in the catalog as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Petitioner received the magazine on June 16, 1987, via a controlled delivery. Pursuant to a warrant, postal inspectors then searched petitioner's home and found the magazine. Pet. App. 2a; Pet. 11-13.[1]

2. At trial, petitioner contended that he had been entrapped because there was no evidence that he was predisposed to commit the instant offense. On appeal, however, petitioner's primary argument was that because the government lacked reasonable suspicion to conduct an undercover investigation of him, the government's conduct was outrageous and should bar his conviction.[2] Petitioner prevailed on his claim before a divided panel of the court of appeals. The majority held that petitioner's 1984 order from the California bookstore was not evidence of predisposition and did not furnish reasonable suspicion that petitioner had committed a crime or was likely to do so. Pet. App. 22a-23a, 25a-26a. Judge Fagg dissented. He con-

---

[1] At about the same time, petitioner ordered a set of sexually explicit photographs from a firm that was an undercover front for the Customs Service. Those photographs were never delivered. Pet. App. 2a; Pet. 12.

[2] Although petitioner did not make that claim at trial, the court of appeals entertained it on appeal.

cluded that reasonable suspicion is not a prerequisite to an undercover investigation, and that, in any event, the government had reasonable suspicion here. *Id.* at 26a-29a.

On rehearing en banc, the court of appeals adopted the views of Judge Fagg. The court observed that "[d]ue process limitations 'come into play only when the [g]overnment activity in question violates some protected right of the defendant.'" Pet. App. 3a (quoting *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (emphasis omitted)). Since, in the court's view, petitioner did not have a constitutional right to be free from investigation, the initiation of that investigation did not violate petitioner's due process rights. As to petitioner's argument that the government needed reasonable suspicion before investigating him, the court joined the other courts of appeals that have refused to impose such a requirement. Pet. App. 4a-5a. The court went on to find that the government's conduct in this case was not outrageous, because the government simply mailed surveys, letters, and catalogs to petitioner, and he voluntarily responded. In the words of the court, "[t]he postal inspectors did not apply extraordinary pressure on [petitioner]. The inspectors merely invited [petitioner] to purchase pornographic material through the mail." *Id.* at 5a. Petitioner could have ignored the contents of the mailings, the court said, so the supposed entreaties to him involved far less pressure than would have been involved in face-to-face contacts. *Id.* at 6a.[3]

Two judges dissented. Chief Judge Lay stated that petitioner was not predisposed to commit the charged offense, so in his view petitioner was entrapped as a matter of law. Pet. App. 7a-8a. Judge Heaney, the author of the panel

[3] The court likewise rejected petitioner's claim that he had been entrapped as a matter of law. The court found instead that there was sufficient evidence to warrant the jury's finding of predisposition. Pet. App. 6a-7a.

opinion, reiterated his views that the government's investigative conduct in this case was outrageous and that the government should be required to have reasonable suspicion of criminal activity before commencing an undercover criminal investigation. *Id.* at 8a-19a.

ARGUMENT

Petitioner renews his claim that because the government did not reasonably suspect him of criminal activity, the investigation of him was improper and should have been deemed "outrageous government conduct" so as to bar his conviction. Pet. 14-27. The contrary decision of the court of appeals is correct, however, and is in accord with the decisions of this Court and every other court of appeals that has confronted the issue. Consequently, further review is not warranted.

In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), the Court introduced the notion of an outrageous government conduct defense and distinguished it from the entrapment defense. In dictum the Court noted that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but the Court found that neither defense was satisfied in that case. Three years later, in *Hampton* v. *United States*, 425 U.S. 484, 489-490 (1976), a plurality of the Court expressed doubt that outrageous government conduct in the course of an investigation could ever provide a defense to a criminal defendant. Instead, any due process limitations come into play, the plurality concluded, only when governmental conduct violates a defendant's protected rights. *Id.* at 490. Two Justices concurred in the affirmance of Hampton's conviction, but expressed the view that an outrageous government

conduct defense might be open to a defendant in an exceptional case. *Id.* at 492-495 (Powell, J., concurring in the judgment).

In the wake of *Hampton*, the courts of appeals have held that a defendant may prevail on a claim of outrageous governmental conduct only by showing that the conduct was "truly outrageous." See, *e.g.*, *United States* v. *Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989) (collecting cases); *United States* v. *Driscoll*, 852 F.2d 84, 86 (3d Cir. 1988). Offers of inducement have been held to be proper, because the Due Process Clause grants law enforcement agencies "wide leeway" in conducting their investigations of crime. *United States* v. *Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983).

No constitutionally protected right of petitioner was violated in this case. Petitioner had no right to possess child pornography, *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), and he had no right to be free from investigation, *e.g.*, *United States* v. *Trayer*, 898 F.2d 805, 808 (D.C. Cir.), cert. denied, 111 S. Ct. 113 (1990). Hence, he can prevail only if he can show that the government's conduct in sending him a few letters, surveys, and catalogs was so outrageous as to offend the notion of due process. As the court of appeals aptly observed, Pet. App. 6a, those actions were far less pressing inducements than those that typically occur between two persons in face-to-face meetings. This very type of conduct was held not to be outrageous in *United States* v. *Driscoll*, 852 F.2d at 85-87.

The decision below also is in accord with the unanimous view of other circuits that the government need not have reasonable suspicion of criminal activity before beginning an undercover investigation of a particular individual. *United States* v. *Luttrell*, No. 87-5303 (9th Cir. Jan. 23, 1991) (en banc), slip op. 750-751; *United States* v. *Driscoll*, 852 F.2d at 86-87; *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099

(1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980); see also *United States* v. *Thoma*, 726 F.2d 1191, 1198-1199 (7th Cir.), cert. denied, 467 U.S. 1228 (1984).[4] Those courts recognize that as long as the conduct of the investigation does not violate due process, the absence of reasonable suspicion at the outset of the investigation does not bar the conviction of someone who commits a crime. Since the investigation in this case did not violate petitioner's due process rights, he cannot escape liability on the ground that the postal inspectors might not have had reasonable suspicion of his criminal activity at the outset of their investigation.[5]

---

[4] *United States* v. *Hunt*, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985), on which petitioner relies, Pet. 17, does not support his claim. In that case, the court of appeals said that, assuming that an outrageous conduct defense exists, the record showed that the conduct of the investigators "was hardly so 'outrageous[ ]' * * * as to preclude a conviction." 749 F.2d at 1087 (citation omitted). The court went on to note that information sent to the FBI created a reasonable basis for the investigation, but nowhere did the court suggest that such a basis was a prerequisite to a valid investigation.

[5] In the "questions presented" portion of his petition, petitioner lists several other issues that this case purportedly raises. He has not separately addressed any of those additional issues in the body of his petition, however, so we have not responded to them.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
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ROBERT S. MUELLER, III
Assistant Attorney General
LOUIS M. FISCHER
Attorney

MARCH 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 – 282 061/20425

No. 90-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

IN THE

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---

REPLY BRIEF

ARGUMENT

The Solicitor General assumes the government's frustrating tactic of misrepresenting petitioner's contentions.

It is no wonder that the Government wishes to put the petitioner in the position of arguing outrageous government conduct. "The defense that the government's conduct was so outrageous as to require reversal on due process grounds is often raised but is almost never successful." *United States v. Gamble*, 737 F.2d 853, 859 (C.A.10, 1984).

The petitioner recognizes that, "in a sense, entrapment and the due process defense are on a continuum because both are based on the principle that court's must be closed to the trial of a crime instigated by the government's own agents." *Gamble*, 737 F.2d 857 quoting *Sor-*

rells v. United States, 287 U.S. 435, 459, 53 S.Ct. 210, 219, 77 L.Ed. 413, 426 (1932) (Roberts, J., concurring). Both defenses are implicated when the evidence shows that the defendant was lawfully "minding his own business" when the Government involvement begins. *Gamble*, 737 F.2d 858.

However, entrapment focuses on predisposition. "Predisposition is, by definition, the defendant's state of mind and inclinations before his *initial exposure to government agents*." *United States v. Janotti*, 501 F.Supp. 1182, 1191 (E.D. PA., 1980); *United States v. Kaminski*, 703 F.2d 1004, 1008 (C.A. 7, 1983); *United States v. Dawson*, 467 F.2d 688 (C.A. 8, 1978); *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1978).

Entrapment requires an analysis of the following:

1. the character or reputation of the defendant;
2. whether the suggestion of criminal activity was originally made by the Government;
3. whether the defendant was engaged in criminal activity for a profit;
4. whether the defendant evidenced reluctance to commit the offense, overcome by Government persuasion;
5. the nature of the inducement or persuasion offered by the Government.

See *United States v. Thoma*, 726 F.2d 1191, 1197 (1984).

Clearly, "the state of mind of a defendant *before* government agents make any suggestion that he shall commit a crime," *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983); *United States v. Dion*, 762 F.2d 674 (C.A. 8, 1985) has always been considered by the courts of appeal to be of critical importance. In this case, Jacobson's reputation in his community was excellent, the Government suggested the criminal activity; Jacobson had never engaged in criminal activity in any way, let alone for

profit; he was given repeated opportunities to violate the law which he resisted and was induced to violate the law only after the law had been amended to make the receipt of child pornography an offense and the Government had fraudulently assured him that preoccupation with the importation of child pornography was "hysterical nonsense" and that "American Solicitors" had assured the government's front organization that if the material was mailed it could not be seized and opened.

The Eighth Circuit panel did not hold that the Government was guilty of outrageous conduct. It held that petitioner was entrapped as a matter of law because the Government failed to prove that the petitioner had committed a crime or was engaged in criminal activity before employing its undercover artifice and stratagem against him. Jacobson was like Woo Wai; like Butts; like Sorrells; like Sherman; he "had never committed any such offense as the officer of the Government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by (the) testimony." *Butts v. United States*, 279 Fed. 38, 18 A.L.R. 143, 145 (C.A. 8, 1921).

Judge Heaney borrowed from regulations of the attorney general[1] to respond to the government's contention that a reversal in *Jacobson* would hamstring Government undercover investigations. Judge Heaney's point was that the Government could hardly be handicapped by a

---

[1] 28 C.F.R. § 23.20(a) (1990) provides:

> Criminal intelligence, information concerning an individual shall be collected and maintained only if it is reasonably suspected that the individual is involved in criminal activity and that information is relevant to that criminal activity.

§ 23.1 of that title provides that the purpose of the regulation is to assure that criminal intelligence systems operating under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, *et seq.*, are operated in conformance with the privacy and constitutional rights of individuals.

requirement that it just follow its own rules. The underpinning precedents for his discussion were cases which had been authority in the Eighth Circiut since 1921, fifty-five years before *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976) generated the "outrageous government conduct" defense.

Judge Fagg's en banc opinion says defendant is really arguing Fifth Amendment principles. Petitioner does not say this. Judge Heaney does not say it. None of the Eighth Circuit cases preceding *Jacobson* say it. Thus, it is Judge Fagg who departs from established precedent and transforms the entrapment defense. The Eighth Circuit's en banc opinion holds that:

1. Once a jury has found a defendant predisposed, no matter on what sort of evidence nor how and when obtained, predisposition is a settled issue;
2. All Government undercover operations must be reviewed under due process principles;
3. Since due process limitations 'come into play only when the Government activity in question violates some protected right of the defendant' and there is 'no constitutional right to be free from investigation' due process is never violated and government undercover operations are beyond the court's power to review.

The assertion that, "there is no right to be free from investigation," is a line taken completely out of the context of *United States v. Trayer*, 898 Fed.2d 805 (D.C. Cir., 1990).

Trayer was a Fourth Amendment case. A drug sniffing Golden Retriever came to a point outside Trayer's roomette on an Amtrak train stopped in Washington's Union Station. An examination of the train's manifest disclosed that Trayer fit the profile of a drug courier. The circuit court held that there was not just reasonable suspicion to search the roomette but probable cause.

The *Trayer* opinion ascribes the quoted phrase to *United States v. Lloyd*, 886 F.2d 447 (D.C. Cir. 1989). However, the language does not appear in *Lloyd*. Lloyd also fit the drug courier profile. Lloyd contended that he was "seized" as the term is used in the Fourth Amendment. The Circuit Court found he was not and that a consensual search of Lloyd's luggage was valid because "Lloyd was not forcibly detained or physically abused."

Extrapolating the rule that everyone is always subject to a so called "investigation" from these cases in which there was good reason to investigate evades the rule that entrapment requires proof of predisposition *before* Government agents begin their interaction with the defendant and illustrates precisely just how dangerous the Eighth Circuti's opinion is. Far from justifying Judge Fagg's views, *Trayer* and *Lloyd* furnish further grounds for granting certiorari.

The Solicitor General also repeats the assertion that the petitioner did not raise the issue he now argues in the circuit court. Petitioner has always argued that the Government had adduced no evidence that petitioner had ever had any intention of violating the law, so therefore, the Government had failed to prove that petitioner was predisposed to commit the crime charged in the indictment. Petitioner relied on the numerous circuit court entrapment opinions focusing on the petitioner's state of mind *before* Government agents suggest the commission of a crime.

The government's response, then as now, was that the petitioner's interest in teenage sexuality, his admitted homosexuality and other selected responses to the postal inspectors' sexual attitude surveys established predisposition.

Petitioner's rejoinder, then and now, was that "private fantasies are not within the statute's (18 U.S.C. § 2252(a)(2)) ambit." *United States v. Wiegand*, 812 F.2d 1239 (C.A. 9, 1987). Petitioner urged that although

"artifice and stratagem may be employed to catch those engaged in criminal enterprises" *Sorrells v. United States*, *supra*, the Government had to prove a "previous intent to violate the law", *United States v. Dawson*, *supra*, before artifice and stratagem are justified. Just showing that petitioner had an interest in preteen sex is not proof that he would commit a crime to satisfy it any more than showing that someone who watches "Columbo," for instance, is proof that they will commit murder.

The Solicitor General concludes his resistance to the petition for certiorari by saying that it is the unanimous view of the other circuits that the Government need not have a reasonable suspicion of criminal activity before beginning an undercover investigation of a particular individual. The Solicitor General cites *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir., 1984); *United States v. Janotti*, 673 F.2d 578 (C.A. 3, 1982); *United States v. Myers*, 635 F.2d 932 (C.A. 2, 1982).

These ABSCAM cases are clearly different from *Jacobson*. The Attorney General's guidelines on F.B.I. undercover operations identify two distinct types of undercover operation:

> a. (where) there is a reasonable indication, based on information developed through informants or other means, that the subject in engaging, has engaged or is likely to engage in illegal activity.
>
> b. The opportunity for illegal activity has been structured so that there is reason for believing that persons brought to it are predisposed to engage in the contemplated illegal activity.

ABSCAM falls in the second classification of undercover activities. The Government, posing as an Arab Sheik named Abdul, offered a commodity, money, in exchange for favorable planning commission and city council votes on a construction project in downtown Philadelphia and favorable Congressional votes on a private immigration bill.

The Government prosecuted those who "rose to the bait."

Jacobson falls in the first classification of undercover activities. Jacobson was targeted. The Government set out to find some "trickery, persuasion or fraud" (*Sorrels*, 77 L.Ed. 423) which would incite Jacobson's homosexuality into criminal activity. Since a violation of the child pornography statute apparently does not require a specific intent, it was not even necessary for Jacobson to know that he was committing a crime.[2]

The Solicitor General also cites *United States v. Driscoll*, 852 F.2d 84 (C.A. 3, 1988); *United States v. Gamble*, *supra*; *United States v. Thoma*, *supra*, and *United States v. Luttrell*, No. 87-5303 (C.A. 9, January 23, 1991).

The defendant did not raise entrapment in either *Driscoll* or *Gamble*. Unless Judge Fagg is correct and the outrageous government conduct defense is the defendant's only approach, these cases do not belong in the Solicitor General's strip cite. In *Thoma*, the defendant had once been convicted of mailing child pornography, confessed that he had only "gotten involved again (because) money was tight" and possessed sophisticated equipment for producing child pornography. The Seventh

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[2] Petitioner argued at trial that 18 U.S.C. § 2252(a) was unconstitutional because it imposed a severe and stigmatizing penalty, ten years imprisonment and $100,000.00 fine, was an offense derived from the common law crime of open and notorious lewdness, Part II, Vol. III, A.L.I. Model Penal Code, § 251.1, p. 448 (1980) and appears in Title 18 of the federal criminal code with other specific intent statutes, 18 U.S.C. § 2241, § 1735, § 1737. *Morisette v. United States*, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 (1952); *United States v. United Gypsum Company*, 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978). Petitioner offered instructions which included the element of specific intent (CR 71, 72) and objected to the instruction given by the trial court (T301). The issue was rasied in petitioner's brief in Eighth Circuit but the court's en banc opinion does not discuss it.

Circuit held that defendant was not entraped as a matter of law. *Luttrell* is not even an opinion. It is an order vacating a prior panel opinion. It relies solely on *Jenrette, Janotti, Myers* and *Gamble.*

In *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958), the court held that there was such a thing as entrapment as a matter of law. In *Sorrells v. United States, supra*, the court said that entrapment was not a constitutional defense. Both of these cases involved undercover operations.

The Eighth Circuit has now held that entrapment *is* a constitutional defense, that Government undercover operations are always reviewed on Fifth Amendment principles, that predisposition, once settled by a jury adversely to the defendant in the trial court, is not subject to review in the circuit court, that the defendant's sole avenue of attack is along Fifth Amendment lines which necessarily fail because there is "no constitutional right to be free from investigation."

That chilling catch phrase neatly answers every argument that defendant makes. No right to be left alone. No right to privacy—none at all! The Government can intrude where and in what manner it pleases as long as its methods are covert rather than overt because the Government always has the right to investigate.

Characterizing what the Government did to Jacobson as "investigation" is perhaps the cruelest euphemism of all. The facts do not disclose an "investigation". They disclose a campaign conducted over the course of years to find the right button which Government agents could push to induce the defendant to commit a crime. It was playing "on the weaknesses of an innocent party" in order to beguile "him into committing crimes which he otherwise would not have attempted." *Sherman, supra.*

CONCLUSION

There has always been a distinction between entrapment and outrageous government conduct. Indeed, entrapment as a matter of law existed in virtually all the states and courts of appeal eleven years before *Sorrells* v. *United States*, Ann. 18 A.L.R. 146. State courts had almost unanimously responded to crimes instigated by the Government that it was not the purpose of the Government to solicit crime, but to ascertain if the defendant was engaged in unlawful business. Various legal theories were advanced to underpin the defense but none of them were based on due process.

Petitioner's argument is not what the Government says it is. Petitioner's argument is that he was neither engaging in nor contemplating criminal activity; that the criminal design originated with the Government which implanted in the mind of an innocent person the disposition to commit the alleged offense.

This is standard entrapment material. The Government agenda for making convictions ever easier to obtain and retain wants to call this "outrageous government conduct."

A sheep is not a sheep if it is a goat.

The Eighth Circuit has gone further than the Supreme Court and created a new and disagreeable proposition. Certiorari should be granted.

If there is no entrapment as a matter of law any more, the Supreme Court should say it. If entrapment must be considered under Fifth Amendment principles, the Supreme Court should say it. If anyone can be made a target of an undercover Government campaign to induce them to commit a crime no matter how innocent

their activities nor how they are selected as targets, then the Supreme Court should say it.

Respectfully submitted,

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No. 90-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 14, 1991
CERTIORARI GRANTED APRIL 22, 1991

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DATE	FILINGS/PROCEEDINGS
9-14-87	Indictment
4-19-88	Beginning of Trial
4-26-88	End of Trial
7-1-88	Judgment and Conviction
7-11-88	Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

2-13-89	Argument before the Panel
1-12-90	Panel Opinion
1-12-90	Judgment
1-23-90	Granting of Government's Motion to Extend Time for Filing Rehearing Petition
2-7-90	Filing of Rehearing Petition
4-20-90	Granting of Rehearing Petition
5-17-90	Argument before the En Banc Court
10-15-90	En Banc Opinion
10-15-90	En Banc Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR 87-0-77
JUDGE BEAM

UNITED STATES OF AMERICA
Plaintiff,

vs.

KEITH M. JACOBSEN,
Defendant.

INDICTMENT
(18 U.S.C. § 2252)

[SEALED INDICTMENT]

[Filed Sep. 14, 1987]

The Grand Jury Charges:

COUNT I

On or about June 16, 1987, in the District of Nebraska, KEITH M. JACOBSEN knowingly received a visual depiction, that is: a magazine, the production of which involved the use of minors engaging in sexually explicit conduct and which magazine visually depicted minors engaged in sexually explicit conduct, which magazine had been mailed.

In violation of Title 18, United States Code, Section 2252.

A TRUE BILL:

/s/ Robert Sheppard
Foreman

/s/ Ronald D. Lahners
RONALD D. LAHNERS
United States Attorney

The United States of America requests that trial of this case be held at Omaha, Nebraska, pursuant to the rules of this Court.

/s/ Ronald D. Lahners
RONALD D. LAHNERS
United States Attorney

CAUTIONARY INSTRUCTION

THE COURT: * * * Ladies and gentlemen of the jury, at the conclusion of this case I will be giving you some written instructions on how you are to consider some of this evidence. This type of evidence that has just been offered is evidence that can be used by you for only certain limited purposes. Those purposes will be explained more fully in a written instruction. They are not to prove that the defendant committed the act with which he is charged in the indictment. This evidence is being received to show what the defendant's predisposition may or may not have been with respect to the receipt of material that falls within the definition of the statute. The definitions will be given to you also at the conclusion of this case so you don't need to be worried about what that definition is, but this evidence is received only for that purpose, to show what predisposition, if any, the defendant may have had towards the receipt of this type of material.

JURY INSTRUCTIONS

[524] "INSTRUCTION NUMBER 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

It is your duty to follow the law given you in this charge and to apply these rules of law to the *evidence* as you find them from the evidence."—I even can't read—"and to apply these rules of law to the facts as you find them from the evidence.

[525] You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than given in these instructions, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case and the reasonable inferences arising from such evidence.

INSTRUCTION NUMBER 2

At the outset I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

[526] However, each of you should, individually and of your own accord, decide for yourself upon the guilt or innocence of the defendant. You should, indeed, consult, discuss and deliberate with one another with a view to arriving at an agreement, if you may do so without the abandonment of your individual judgment. But you should not surrender a firm conviction respecting the guilt or innocence of the defendant, either out of deference to the opinion of your associates on the jury or for the sole purpose of returning a verdict. A verdict by this jury should reflect not only the common agreement of all of you but as well the individual judgment of each of you.

INSTRUCTION NUMBER 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. 'Direct evidence' is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. 'Circumstantial evidence' is proof of a chain of facts and [527] circumstances indicating either the existence or non-existence of certain facts. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

INSTRUCTION NUMBER 4

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said or only part of it or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, and all of the evidence, facts and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take [528] the testimony of any witness as true and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to or that for any other reason appearing in the evidence the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts, not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

The testimony of a law enforcement agent is entitled to no special weight. All persons who take the witness stand subject their testimony to the same examination

and the same tests as any other witness. You should not believe the testimony of a witness merely because the witness is a law enforcement agent.

[529] A defendant who wishes to testify is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness.

INSTRUCTION NUMBER 5

You are informed that the rules of evidence permit a law witness to give his testimony in the form of opinions and inferences, if those opinions or inferences are rightfully based on the perception of the witness and helpful to the clear understanding of his testimony or the determination of the fact in issue.

A witness who, by training and experience, has become an expert in any art, science, profession or calling may be permitted to state his or her opinion of the facts or data upon which the expert bases his or her opinion or inference as perceived by or made known to the expert at or before the hearing. An expert may give an opinion or inferences and reasons therefor without prior disclosure of the underlying facts or data unless the Court requires otherwise. You should consider such opinions received herein, either expert or from a lay witness, and give such opinions and inferences such weight as you think they deserve; and you may reject such opinions or inferences entirely if you conclude the reasons given in support of the opinion or inferences are unsound.

[530] INSTRUCTION NUMBER 6

As you have become aware during the course of this trial, this is a prosecution upon criminal accusations, instituted by and in the name of the United States of America, which is the sole plaintiff in this action. It is brought against Keith M. Jacobson and he is the only defendant in this action. Hereafter I may occasionally refer to the United States of America simply as 'the

plaintiff' or 'the government.' The defendant may be referred to as 'defendant' or by his proper or legal name.

INSTRUCTION NUMBER 7

The indictment charges as follows:

Count I: On or about June 16, 1987, in the District of Nebraska, Keith M. Jacobsen knowingly received a visual depiction, that is, a magazine, the production of which involved the use of minors engaging in sexually explicit conduct and which magazine visually depicted minors engaged in sexually explicit conduct, which magazine had been mailed.

In violation of Title 18, United States Code, Section 2252.

INSTRUCTION NUMBER 8

An indictment is only a formal method of accusing the defendant of a crime. It is not evidence of any kind against the defendant and the jury should not be influenced [531] in any way against the defendant because of an indictment returned against him.

The indictment charges that the offense involved was committed 'on or about' certain dates. It is not necessary that the proof establish with certainty the exact date of an alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that an offense was committed on a date reasonably near the date alleged.

The defendant is not on trial for any act or conduct not alleged in the indictment.

INSTRUCTION NUMBER 9

As to the charges contained in Count I of the indictment, there are three essential elements which the government must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crimes charged:

1) That the defendant knowingly received a visual depiction, that is, a magazine, depicting a minor engaging in sexually explicit conduct.

2) That the producing of the visual depiction involved the use of a minor engaged in sexually explicit conduct.

3) That the visual depiction had been sent in the United States mails.

[532] If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime charged in the indictment. On the other hand, if you find the government has failed to prove beyond a reasonable doubt any one or more of the foregoing essential elements, it is your duty to find the defendant not guilty of the crime charged.

INSTRUCTION NUMBER 10

A 'minor' means any person under the age of eighteen years.

'Sexually explicit conduct' means actual or simulated sexual intercourse including genital-genital, oral-genital, and anal-genital contact, whether between persons of the same or opposite sex; or actual or simulated masturbation; or lascivious exhibition of the genitals or pubic area.

'Producing' means producing, directing, manufacturing, issuing, publishing or advertising.

INSTRUCTION NUMBER 11

In determining whether a visual depiction of a minor constitutes a lascivious exhibition of genitals or pubic area, you may consider whether the focal point of the visual depiction is on the child's genitalia or pubic area, whether the setting of the visual depiction [533] is sexually suggestive, whether the child is depicted in an unnatural pose or in inappropriate attire, whether the child is fully or partially clothed or nude, whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

INSTRUCTION NUMBER 12

If you find that any of the pictures of the magazine *Boys Who Love Boys* show minors engaged in sexually explicit conduct, you are instructed that the producing of the magazine '. . . involve(d) the use of a minor . . .' as that phrase is used in the statute.

INSTRUCTION NUMBER 13

The 'knowing receipt' aspect of Element 1 of this offense requires the government prove beyond a reasonable doubt that the defendant knew the materials he was receiving were visual depictions of minors engaged in sexually explicit conduct. The government is not required to prove that the defendant knew that receipt of these materials was a violation of the law.

INSTRUCTION NUMBER 14

An act is done 'knowingly' if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

[534] INSTRUCTION NUMBER 15

As mentioned, one of the issues in this case is whether the defendant was entrapped. If the defendant was entrapped he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers of their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their

agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

INSTRUCTION NUMBER 15A

You have heard testimony that the defendant, Keith M. Jacobson, made a statement to Calvin Comfort. When you consider this evidence you must decide:

First, did the defendant, Keith M. Jacobson, in fact make the statement?

Second, if the defendant, Keith M. Jacobson, did [535] make such a statement, how much weight should you give to it?

In making those decisions you should consider all of the evidence, including the circumstances under which the statement may have been made. After you have reviewed these matters you may give such weight to the statement you feel it deserves.

INSTRUCTION NUMBER 15B

During this trial certain exhibits were received in evidence which were in possession of the defendant. These are Exhibits 14A, 18A and 18B. Possession of these exhibits is not evidence or proof that he committed the offense charged in the indictment.

You may, however, consider this evidence in determining whether the defendant was predisposed to the receipt of child pornography.

INSTRUCTION NUMBER 15C

You have heard testimony about the character and reputation of the defendant for truthfulness. You may consider this evidence only in deciding whether or not to believe the testimony of the defendant and how much weight to give to it.

INSTRUCTION NUMBER 15D

The defendant presented testimony of witnesses who say that his reputation is that he is law abiding. If you believe that the defendant is law abiding, this might [536] create a reasonable doubt in your mind as to whether he knowingly received a visual depiction of a minor engaging in sexually explicit conduct. You must decide whether to believe this evidence and how much weight to give it.

A person who testified about a defendant's reputation or who gives his opinion about a defendant may be asked whether he had heard or knows specific things about the defendant. If he answers 'Yes,' he may be asked to explain how these things have affected his opinion or the reputation of the defendant. If he answers 'No,' you may consider how this answer bears on what he has said, remembering that what is stated in a question is not evidence and should not be assumed to be true.

INSTRUCTION NUMBER 15E

The government has presented testimony of undercover agents involved in the investigation of this case. Indeed, much of the evidence that has been introduced was derived directly or indirectly from the use of these agents.

The undercover activity may take many forms including 'sting' operations. An agent does not violate any federal statute or rule by utilizing this investigative method. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement. Law-enforcement officials may use stealth and deception in order to apprehend persons engaged in criminal activities provided that they merely afforded [537] opportunities or facilities for the commission of the offense to one predisposed or ready to commit it. Law-enforcement officials may properly make use of undercover operations in which they use false names, establish false business enterprises and give the appearance of being prepared to engage in illegal activities.

INSTRUCTION NUMBER 16

Intent rarely, if ever, can be proved by direct evidence. Intent is a mental process and it, therefore, generally remains hidden within the mind where it is conceived. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or committed.

Intent may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the offense or offenses alleged and whether at such time he had the intent required by these instructions. [538]If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NUMBER 17

The law presumes a defendant to be innocent of crime. Thus, the defendant although accused begins the trial with a 'clean slate'—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury wil remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to [539] a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling witnesses or producing any evidence. There is no burden upon a defendant to prove that he is innocent.

So if the jury after careful and impartial consideration of all the evidence in the case has a reasonable doubt that the defendant is guilty of a charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilty—the jury should of course adopt the conclusion of innocence.

INSTRUCTION NUMBER 18

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

[540] The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as

exhibits; and (3) any facts that have been stipulated—that is, formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony I told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NUMBER 19

In the trial of this case and in this charge I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say I must admonish you that you are the sole judges of the facts and your verdict must respond to your own conclusions from the evidence.

[541] INSTRUCTION NUMBER 20

You must disregard entirely any personal sympathy which you may have or feel for the defendant, Keith M. Jacobson. Likewise, however, you must entirely disregard and be uninfluenced by any inclination toward a personal prejudice against the defendant. You must determine this case solely upon the evidence before you and the law as now given you in this charge.

INSTRUCTION NUMBER 21

You have nothing whatever to do with the punishment of the defendant in the case of his conviction. Therefore, in determining his guilt or innocence you have no right

to take into consideration what punishment, if any, he may or may not receive in the event of his conviction.

INSTRUCTION NUMBER 22

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. As I have already informed you, you are bound to receive and accept as correct the law as given you in this charge and you are not priviliged to entertain an opinion as to the law or what [542] the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions contained in this charge and, therefore, you must consider the charge in its entirety, giving due weight to each instruction and construing each instruction in the light of and in harmony with the other instructions, and so apply the principles set forth to all of the evidence received during the trial."—

• • • •

[543] INSTRUCTION NUMBER 23

Upon retiring to the jury room you shall first select one of your number as a foreperson to preside over your deliberations and who alone will sign your form of verdict. You will then proceed immediately with your study of and deliberations of the case.

In arriving at your verdict remember it must be unanimous. Short of unanimity, you cannot consider that you have reached a verdict.

You will take with you a blank form of general verdict which will adequately reflect your verdict.

After you have arrived at your verdict regarding the indictment against the defendant, your foreperson will simply write either the word 'guilty' or the words 'not guilty' in the blank space provided in the form of verdict for each [544] count of the indictment.

Your foreperson will then date and sign this form of verdict and when so completed it will constitute your verdict.

You will be allowed to separate for your meals and for any necessary intermission between 5:00 p.m. today and tomorrow morning at 9:00 o'clock a.m.

If it becomes necessary during your deliberations to communicate with the Court, your foreperson may send a written note by the Marshal. Never attempt to communicate with the Court by any means other than a signed writing. And bear in mind that you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

In addition you are to keep in mind all of the eariler admonitions of the Court and especially to refrain from any discussion of the case with anyone and to avoid reading or viewing any news about this case.

As the Judge presiding over the trial I shall be available in this building throughout your deliberations and until your verdict has been returned and shall receive it promptly upon its return."

* * * *

No. 90-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Where the Government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade the defendant to receive child pornography through the mails and the petitioner does not qualify either under the Attorney General's Guidelines for the conduct of undercover operations or the guidelines established by the Postal Inspectors for inclusion in the undercover operation in which petitioner is finally ensnared, whether the petitioner has been entrapped as a matter of law?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Eighth Circuit's Panel Opinion is reported in 893 F.2d 999 (C.A. 8, 1990). The Eighth Circuit's Opinion on rehearing en banc is reported at 916 F.2d 467 (C.A. 8, 1990).

JURISDICTION

The Court has granted certiorari to the United States Court of Appeals for the Eighth Circuit to review a judgment and conviction obtained upon an indictment for a single count of violating 18 U.S.C. § 2252(a)(2) (1986).

Jurisdiction of the Court is invoked under 18 U.S.C. § 1254(1). The time factors upon which jurisdiction rests are:

a. date of verdict: April 26, 1988;

b. date of sentence: June 30, 1988;

c. date notice of appeal was filed in the United States District Court for the District of Nebraska pursuant to Rule 4(b), F.R.App.P.: July 11, 1988;

d. date en banc judgment affirming defendant's conviction entered by Eighth Circuit Court of Appeals: October 15, 1990;

e. date of filing petition for Writ of Certiorari pursuant to Rule 13 of the United States Supreme Court: January 14, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 2252(a)(2) (1986):

(a) any person who—

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including through the mails; if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000.00, or imprisoned no more than 10 years, or both, but, if such an individual has a prior conviction under this section, such individual shall be fined not more than $200,000.00,

or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.00.

Title 18 U.S.C. § 2256 (1986):

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse (for the purpose of sexual stimulation); or

(E) lascivious exhibition of the genitals or pubic areas of any person;,

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than the individual;

(5) "visual depiction" includes undeveloped film and videotape.

Fourth Amendment to the Constitution of the United States:

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner's Statement of the Case in the Petition for Writ of Certiorari contains a ten page statement of the facts which will not be repeated herein to avoid encumbering the record.

Petitioner was indicted on September 14, 1987 in the United States District Court for the District of Nebraska at Omaha on one count of receiving child pornography, a violation of 18 U.S.C. § 2252(a)(2).

Petitioner was tried before The Honorable Lyle E. Strom and a jury consisting of three men and nine women in Omaha, Nebraska commencing April 19, 1988.

During the testimony of Calvin Comfort, the Postal Inspector in charge of the petitioner's case (T.R. 178:14), the Government sought to introduce Exhibit 7 (T.R. 181:5) which was the membership application and sexual attitude survey sent to the petitioner by the postal inspectors who were operating the American Hedonist Society "sting" from Madison, Wisconsin to attempt to "get targeted individuals to join it and trade (child pornography) through it." (T.R. 166: 15, 19; 170:1). Petitioner's counsel immediately objected (T.R.181:8) and when the Court indicated it was going to overrule the objection and receive the Exhibit, defendant's counsel

asked the court for leave to approach the bench (T.R. 182:24). The trial was adjourned for the day and the court heard objections from defendant's counsel on relevancy, materiality and foundation which begin at page 184 of the trial record and continue through page 205. In the course of these objections, petitioner's counsel expressly advised the court that the evidence was not relevant or material because it did not indicate a predisposition to commit the crime charged in the indictment (T.R. 195:16) and that the only purpose of the evidence was to show that the petitioner had perverted sexual interests. Petitioner's counsel argued that the evidence which the Government was required to adduce was that the petitioner not only had an interest in child pornography but that he would commit a crime to obtain it (T.R. 200:6). The court reserved ruling on the objections.

Later, the prosecution sought to introduce Exhibit 18, 18A and 18B through Comfort. Exhibit 18 was the envelope in which *Bare Boys I and II* had been sent to the petitioner and 18A and 18B were the magazines. Petitioner's counsel again requested permission to approach the bench (T.R. 233:20) and the jury was again excused. The petitioner's objection was that it had been stipulated that it was not a violation of federal law to obtain the material and possession of the magazines was not a crime (T.R. 242:11). Counsel advised the court that the exhibits were remote in time to the offense committed, that they were irrelevant, that they did not evidence an intent to violate the law because they were legally obtained and that foundation was insufficient (T.R. 242:11-244:11). Petitioner's counsel expressly mentioned that there was a problem with receipt of the evidence because the statute, 18 U.S.C. § 2252(a)(2) had been amended to criminalize conduct which was not illegal when *Bare Boys I and II* were ordered and received and the Government was offering them to show a predisposition to commit an offense before it was an offense. The Government's re-

sponse was that the two magazines were a thinly veiled attempt to sexually arouse the viewer (T.R. 238: 3-14). The court received the magazines and immediately gave an instruction that:

> . . . This evidence is being received to show what defendant's predisposition may or may not have been with respect to the receipt of material that falls within the definition of the statute. . . . (J.A. 4)

Even though the Government had promised the Court that it would not try the defendant for his sexual preferences (T.R. 203:9), ever after these rulings and other later rulings on the admissibility of further exhibits, this is exactly where the Government focused and that is exactly where it has been focused in every Government brief and argument since.

At the conclusion of the Government's case, petitioner's counsel moved for summary acquittal pursuant to Rule 29 F.R.Cr.P. (T.R. 382: 2). The motion specifically raised the contention that the defendant had been entrapped as a matter of law. (T.R. 383: 16; 385: 12). The court overruled the motion. (T.R. 388: 5-6).

Petitioner's counsel renewed the motion at the close of all the evidence (T.R. 487: 16-21). The Court again overruled the motion (T.R. 487: 22). The jury retired to deliberate on April 26, 1988, and that same day returned a verdict of guilty.

Petitioner renewed his motion for summary acquittal on May 3, 1988 and simultaneously filed a Motion for New Trial pursuant to Rule 33 of F.R.Cr.P.

The trial court overruled the motions, entered judgment of conviction and sentence on June 30, 1988. Notice of Appeal to the Eighth Circuit Court of Appeals was filed July 11, 1988 pursuant to Rule 5(b) F.R.App.P. The case was argued to a panel of the Eighth Circuit Court of Appeals consisting of Chief Judge Donald P. Lay, Circuit Judge George G. Fagg and Senior Circuit Judge Gerald W. Heaney on February 14, 1989.

On January 12, 1990, Senior Circuit Judge Heaney, joined by Chief Judge Lay, reversed petitioner's conviction, holding that petitioner had been entrapped as a matter of law. *United States v. Jacobson*, 893 F. 2d at p. 1002.

On February 7, 1990, the Government petitioned the Eighth Circuit Court of Appeals for rehearing and suggested a rehearing en banc. A rehearing en banc was granted on April 20, 1990. 889 F.2d 1549.

The case was reargued before the entire Eighth Circuit on May 17, 1990. On October 15, 1990, in an opinion by Judge Fagg, the Eighth Circuit en banc vacated the panel's opinion and reinstated the petitioner's conviction. 916 F.2d 467. Senior Circuit Judge Heaney and Chief Judge Lay both filed dissenting opinions. 916 F.2d 470, 471.

Petitioner timely filed a petition for writ of certiorari in the United States Supreme Court on January 14, 1991.

The United States Supreme Court granted certiorari on April 22, 1991. *Jacobson v. United States*, —— U.S. ——, 113 L.Ed.2d 716, —— S.Ct. —— (1991).

SUMMARY OF ARGUMENT

The standard of appellate review of the sufficiency of the evidence in a federal criminal case is whether any rational jury, considering all of the evidence in the light most favorable to the Government, could conclude that the defendant was guilty beyond a reasonable doubt. *United States v. Duvall*, 846 F.2d 966 (C.A. 5, 1988).

Where the government has persuaded the trial court to receive evidence that the defendant had a sexual desire to look at pictures of naked boys and the trial court has instructed the jury that such evidence may be considered by the jury as evidence of predisposition the focus of the entrapment defense is changed from an ex-

amination of the defendant's criminal design to gratify a sexual desire and instead has become an investigation of the desire. *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 371, 93 S.Ct. 1637 (1973).

There are numerous reasons why the law does not countenance entrapment. Officers of the law should scrupulously avoid undercover tactics which lead to entrapment, because, among other things, entrapment squanders police resources, punishment ceases to be a response but an end in itself and confidence in the legal system is eroded. *United States v. Bogart*, 783 F.2d 1428 (C.A. 9, 1986).

The Circuit Courts have generally agreed that the government must prove predisposition where the defendant raises the entrapment defense by showing that the defendant had an intent or purpose to break the law before anything at all occurred respecting the alleged offense. *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983).

The Government cannot satisfy this burden by offering proof of the weakness of an innocent party obtained through the defendant's responses to correspondence and sexual attitude surveys secured as a result of undercover operations in which the defendant was solicited to send or receive child pornography but did not.

Where entrapment is properly raised as a defense in the trial court, the Government has the burden to prove beyond a reasonable doubt that the defendant was not induced to commit the crime charged and that he was predisposed to commit the crime charged. *Matthews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 108 S. Ct. 883 (1988).

The notion that the Government must prove beyond a reasonable doubt that before anything at all happens with respect to the crime charged in the indictment, the defendant had an intent and purpose to violate the law has

existed an an element of entrapment for years and has been embodied in one of the commonly used entrapment instructions found in 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 13.09, p. 224, 3rd Ed., West, 1977, 1990 pocket part. The same instruction also embodies the notion that the Government must suspect that a person is engaged in illicit activity before offering that person an inducement or opportunity to commit a crime. This instruction has been approved time and again, so often that the notion that the defendant must be shown to have an intent to violate the law and the Government must suspect the defendant is engaged in illict activity before offering an opportunity to commit a crime is firmly established.

An inducement occurs whenever the Government's conduct has created a substantial risk that an offense would be committed by a person other than one ready to commit it. *United States v. Johnson*, 872 F.2d 612 (C.A. 5, 1989).

The circuit courts have identified approximately eleven factors to be considered in determining whether a defendant who raises the entrapment defense has an intent and purpose to violate the law before the Government agents afford him the opportunity to do so. *United States v. Dion*, 762 F.2d 674, 687 (C.A. 8, 1985). When the undisputed facts of this case are compared to the factors, seven factors favor petitioner, two favor the Government, one is a tie and one factor is not present due to the way in which the undercover operation was structured.

Although both the executive and legislative branches of the federal government have recognized that Government detectives should not target individuals for inclusion in Government stings unless they have a reasonable suspicion that the potential target has committed a similar crime in the past or is likely to commit such a crime in the future, these branches have left the adoption of such a rule to the courts. The court should adopt such a rule

by recasting the suspicion requirement already approved in "the standard" jury charge and either expressed or necessarily implied from cases such as *Woo Wai v. United States*, 223 Fed. 412 (C.A. 9, 1915); *Butts v. United States*, 273 Fed. 35, 18 A.L.R. 143 (C.A. 8, 1921); *Casey v. United States*, 276 U.S. 413, 72 L.Ed. 632, 48 S.Ct. 373 (1928); *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984) and *Sherman v. United States*, 356 U.S 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958).

When the requirement of a reasonable suspicion is applied to the facts of this case, it even more emphatically appears that petitioner was entrapped as a matter of law.

Whether the court adopts a reasonable suspicion test or not, this case should be reversed with directions to dismiss the indictment.

ARGUMENT

I. THE DETERMINATION OF WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT IS NOT IRRETRIEVABLY COMMITTED TO THE JURY.

The Courts of Appeal are not sure that "entrapment as a matter of law" survived *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976).

For instance, in *United States v. Markovic*, 911 F.2d 613 (C.A. 11, 1990), the Eleventh Circuit held:

> Entrapment as a matter of law is no longer a viable defense in this Circuit.

The Eleventh Circuit cited Footnote 6 from *United States v. Struyf*, 701 F.2d 877 (C.A. 11, 1983) wherein the court said:

> The doctrine of Entrapment as a matter of law did not survive the Supreme Court's opinion in *Hampton v. United States*. . . .

This view does not withstand an analysis of Rule 29 of the F.R.Cr.P. nor the traditional function of the trial court in passing upon the sufficiency of the evidence at the conclusion of the government's case and again at the close of all the evidence. Rule 29 states:

> (a) Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . .

In *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), 61 L.Ed.2d at 572 n.10, Mr. Justice Stewart stated:

> The practice in the Federal Courts of entertaining properly preserved challenges to evidentiary sufficiency, . . . , serves only to highlight the traditional understanding in our system that the application of the beyond-a-reasonable doubt standard to the evidence is not irretrievably committed to jury discretion. To be sure, the fact finder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty'. This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal even if the evidence of guilt is overwhelming. The power of the fact finder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty . . . . Any such practice is wholly belied by the settled procedure of testing evidentiary sufficiency through a motion for judgment of acquittal and post verdict appeal from the denial of such a motion.

II. THE DEFENSE OF ENTRAPMENT HAS TWO RELATED ELEMENTS: GOVERNMENT INDUCEMENT OF THE CRIME AND A LACK OF PREDISPOSITION ON THE PART OF THE DEFENDANT TO ENGAGE IN THE CRIMINAL CONDUCT.

The elements of the entrapment defense were first enunciated in *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.LR. 249 (1932), and recently reiterated by Chief Justice Rehnquist in *Matthews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 102 S.Ct. 883 (1988), 99 L.Ed2d at page 60:

> Suffice it to say that the Court has consistently adhered to the view. . . . that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. . . . Predisposition, 'the principal element in the defense of entrapment' . . . focuses upon whether the defendant was an, 'unwary innocent', or, instead, 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. . . . The question of entrapment is generally one for the jury, rather than one for the Court. *Sherman v. United States*, 356 U.S. 369, 377, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958).

Nevertheless, *Sherman* held that the petitioner had been entrapped as a matter of law. In cases which followed it and preceded *Matthews*, *United States v. Russell*, *supra*, and *Hampton v. United States*, *supra*, the defendant admitted predisposition but sought a revision of the entrapment defense which would have grounded it upon the Fifth Amendment rather than rules of statutory construction pronounced in *Sorrells*.

Therefore, any conclusion that the defense of entrapment as a matter of law failed to survive *Hampton*, *supra*, is wholly belied by the settled practice of testing evidentiary sufficiency through a motion for judgment of

acquittal and post verdict appeal from the denial of such a motion.

The court reviews the evidence to determine whether any reasonable juror considering all of the evidence in the light most favorable to the Government could conclude that the defendant was predisposed and not induced by Government agents to commit the crime with which he is charged beyond a reasonable doubt. *United States v. Duvall*, *supra*; *United States v. Lard*, 734 F.2d 1290 (C.A. 8, 1984); *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

In *United States v. Bell*, 678 F.2d 549 (C.A. 5, en banc, 1982) aff'd, 462 U.S. 356, 76 L.Ed.2d 638, 103 S.Ct. 2398 (1983), the Fifth Circuit said:

> It is not necessary that the evidence exclude every reasonable hypotheses of innocence or be wholly inconsistent with every conclusion save that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.

Of course, the burden of proof is upon the Government to establish both lack of inducement and predisposition beyond a reasonable doubt. *Matthews v. United States*, *supra*, 99 L.Ed. at p. 62.

III. PREDISPOSITION REQUIRES MORE THAN JUST PROOF THAT THE DEFENDANT HAS A DESIRE TO LOOK AT CHILD PORNOGRAPHY. THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WILL COMMIT A CRIME TO GRATIFY HIS FANTASY.

Since the defendant was convicted, it is pertinent to ask him at this point why the verdict is irrational upon consideration of all the evidence viewed in a light most favorable to the Government.

The question presupposes a properly instructed jury which has received only admissible evidence.

Over the extensive objection of the defendant (T.R. 184:16-192:17; 193:5-200:11; 241:20-244:11), the trial court permitted the jury to receive and consider evidence acquired by postal authorities during the "sting" operations for which defendant was targeted prior to operation Looking Glass. The trial court received defendant's answers to certain questions in two sexual attitude surveys, "Heartland Institute for a New Tomorrow" and "Midlands Data Research", both postal inspector's stings. The trial court also received the Midlands Data Research Contact letter, all of the "Carl Long" correspondence, the "New York Native" newspaper the defendant mailed to "Carl Long", the two magazines, *Bare Boys I* and *II* which defendant had ordered from Electric Moon and the so-called called "Everything Brochure" which Dennis Odom had included with the *Bare Boys I* and *II* order.

Defendant's objection to this evidence was clear and specific. The defendant urged that the Government could not establish predisposition by showing that the defendant was "hooked on a feeling;" that is, that he may have had a desire to look at pictures of naked boys or that he had an interest in "stories with a gay theme," "teenage sexuality" or "preteen sex."

The defendant argued that the Government could not rely upon magazines and a brochure which the Government had stipulated it was lawful for the defendant to receive to prove that the defendant would break the law. The defendant claimed that scattered answers from sexual surveys could not be used against the defendant without foundation showing that these answers indicated criminal intent or design.

The trial judge was doubtful that *Bare Boys I* and *II* were relevant. He said:

> I guess what bothers me a little bit about it, and it did the other day, Mr. Pendley, is that the nature of those magazines does not suggest illicit sexual ac-

> tivity. They were nudist magazines that talked about health and that type of thing, but they are pictures of boys that are totally undressed but whether or not any of that could be conceived by anybody as being sexually explicit—and that's what I am wondering—so I guess I need a little guidance from you as to how you think this is relevant to the issues, and I, of course, have not seen the magazines. (T.R.236: 5-14).

The Assistant District Attorney's response was the definitive statement of the government's argument for the admissibility of all the contested offers:

> Your Honor, these photographs of these magazines purport to be nudist magazines. I think if the Court will examine them it is very clear that the nudist theme is an extremely thinly veiled guise to show nude children, and just as one example, Your Honor, the picture of the child that I am holding up from *Bare Boys I* on the left, the color photograph, Your Honor, clearly has nothing to do the naturalist's lifestyle. This is a picture taken by somebody who wants to sell pictures to people who want to look at pictures of naked children and these magazines are full of those kinds of pictures. I will hand them to Mrs. Campbell for Your Honor to look at. (T.R. 238: 3-14).

Defendant's counsel then said:

> But, Your Honor, I think there are many, many, many cases in which they say there has to be a specific intent, particularly when you are dealing— (T.R. 250: 19-21).

The Court responded:

> Well, you look at the Eighth Circuit cases now. The intent, the specific intent, is not that he know the law and know that he is violating the law. That's not the specific intent that the Court says the defendant had. He has to know that he is receiving—that type of material that he is receiving is the ma-

> terial that is described in the statute, it's sexually explicit material involving minors, and that, I realize, is the real abbreviation of it, but if he knows he is receiving that kind of material in the mails, the fact that he doesn't know that the statutes of the United States prohibits that conduct is totally irrelevant. It's a violation of the law.
>
> Specific intent doesn't go to the statute, it goes to the conduct. It goes to the materials involved. . . . (T.R. 250: 22-25, 251: 1-11).

In short, the Government believed, and persuaded the trial judge that predisposition could be shown by proving that defendant's sexual interests were outstide the "mainstream". The criminal intent or design required to show predisposition where entrapment is a defense melded in the trial court's mind into petitioner's contention that the statute under which he was prosecuted should be construed to require a specific intent.[1]

The Government was wrong for two reasons: first because predisposition has nothing to do with attitudes or desires be they sexual, pharmaceutical or political; it has to do with an "intent to commit the crime" (*United States v. Russell, supra*, 36 L.Ed.2d p. 371), and second, because such intent or predisposition must appear "before anything at all occur(s) respecting the alleged of-

[1] Petitioner also argued at his trial that 18 U.S.C. § 2252(a) was unconstitutional because it imposed a severe and stigmatizing penalty, ten years imprisonment and $100,000.00 fine, was an offense derived from the common law crime of open and notorious lewdness, Part II, Vol. III, A.L.I. Model Penal Code, § 251.1, p. 448 (1980) and appears in Title 18 of the federal criminal code with other specific intent statutes, 18 U.S.C. § 2241, § 1735, § 1737. Morisette v. United States, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 (1952); United States v. United Gypsum Company, 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978). Petitioner offered instructions which included the element of specific intent (CR 71, 72) and objected to the instruction given by the trial court (T.R. 301). The issue was raised in petitioner's brief in Eighth Circuit but the court's en banc opinion does not discuss it.

fense." *United States v. Williams*, 705 F.2d 603, 618 n.9 (C.A. 2, 1983).

At most, all that this evidence showed was "the weakness of an innocent party" (*Sherman v. United States, supra*, 2 L.Ed.2d, p. 853). Almost all of it was obtained after the postal inspectors contacted Jacobson and began to try to induce him to commit a crime. Nevertheless, once the Assistant District Attorney persuaded the trial judge that predisposition focused upon defendant's sexual preferences rather than his criminal intent, the way was wide open to all sorts of prejudicial prosecutorial mischief.

IV. ENTRAPMENT MUST BE SCRUPULOUSLY AVOIDED IN GOVERNMENT UNDERCOVER OPERATIONS FOR A NUMBER OF SOUND LEGISLATIVE REASONS.

Entrapment is contrary to sound legislative policy for a number of reasons. In *United States v. Bogart, supra*, although dealing with an alleged violation of due process, the court eloquently stated why "entrapment should be scrupulously avoided." (Attorney General's Guidelines, *infra.*)

> Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent government involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself . . .

The Supreme Court of Canada adopted the entrapment defense in *Regina v. Mack*, (1988) 2 S.C.R. 903. The Court thought it "essential to identify why we do not accept the police strategy that amounts to entrapment," (1988, 2 S.C.R. 941). Justice Lamer said:

> . . . There could be a number of reasons underlying what is perhaps an intuitive reaction against such law enforcement techniques but the following are, in my view, predominant. One reason is that the state does not have unlimited power to intrude into our lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have became involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to mitigate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner which conforms to the ideals of morality; little is to be gained by adding to these existing burdens.[2] Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.

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[2] The temptation to engage in pedophilic behavior applies to a wide spectrum of adult males. Dr. Alfred C. Kinsey's report, *Sexual Behavior in the Human Female*, Kinsey, et al., W.B. Saunders Co., Philadelphia, 1953, discloses that of the eight thousand adult women surveyed, about one fourth of them reported sexual contact with an adult male before they had attained the age of twelve.

The *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III-R), American Psychiatric Association, Washington, D.C., 1987 reports that sexual contact between pre-pubescent (age twelve or under) boys with an adult male is approximately one half the rate for girls.

Petitioner would add another important reason to Justice Lamer's list. It is simply a waste of limited police resources to expend time and money inducing people to commit crimes they have never contemplated when there are so many crimes committed by persons who fully intend to violate the law which require detection and prosecution.

Finally, as Justice Lamer also stated:

> If the Court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which comands respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means.

V. BOTH THE ATTORNEY GENERAL OF THE UNITED STATES AND A SELECT COMMITTEE OF THE UNITED STATES SENATE HAVE RECOGNIZED METHODS OF STRUCTURING GOVERNMENT STING OPERATIONS WHICH AVOID ENTRAPMENT.

The *Abscam* hearings reflect that the Executive Branch of the Federal Government has clearly recognized that for all of the foregoing reasons, it was not:

> "the intention of the Congress in enacting this statute (18 U.S.C. 2252 (a)) that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells, supra*, 77 L.Ed. at p. 420.

The final report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate, Senate Report No. 97-682, December 15, 1982, set out the Attorney General's Guidelines for Federal Bureau of Investigation undercover operations promulgated January 1, 1981,

effective February 1, 1981 at p. 550. The guidelines state:

> (1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would not otherwise be disposed to engage.
>
> (2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that:
>
> > (a) The corrupt nature of the activity is reasonably clear to potential subjects;
> >
> > (b) There is a reasonable indication that the undercover operation will reveal illegal activities; and
> >
> > (c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.
>
> (3) Under the law of entrapment, inducement may be offered to an individual even though there is no reasonable indication that that particular individual has engaged or is engaging in the illegal activity that is properly under investigation. Nonetheless, no such undercover operations shall be approved without the specific written authorization of the Director *unless* the Undercover Operations Review Committee determines (See Paragraph 8) insofar as practicable that either:
>
> > (a) there is a reasonable indication, based on information developed through informants or other means that the subject is engaging, has engaged or is likely to engage in illegal activity of a similar type; or,
> >
> > (b) the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or

> brought to it, are predisposed to engage in the contemplated illegal activity.
>
> (4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in an illegal activity, shall be based solely on law enforcement considerations.

The Select Committee recommended that Congress adopt legislation containing a requirement of a "reasonable suspicion based upon articulable facts" before an individual is targeted for undercover operations (Report, p. 377). The report also recommended that the duration of undercover operations be limited to six months to minimize the possibility of overly persistent solicitation. *United States v. Dion*, 762 F.2d 674, 686 (C.A. 8, 1985) n.9.

Although the government may argue that Congressional inaction weakens these findings, the Court has noted before that the failure of Congress to act is not a reliable indicator of Congressional intent. *United States v. Price*, 361 U.S. 304, 4 L.Ed.2d 334, 339, 80 S.Ct. 326 (1960).

Both the Legislative and the Executive Branches of the government have recognized, therefore, the danger that Government "sting" operations will result in entrapment; the Attorney General has laid out the manner in which an undercover operation can be structured so that it does not cause entrapment and the Senate Select Committee has recommended legislation embodying a standard of reasonable suspicion based on articulable facts.

VI. PETITIONER DID NOT QUALIFY FOR INCLUSION IN THE UNDERCOVER OPERATION IN WHICH HE WAS ENSNARED UNDER GUIDELINES ESTABLISHED FOR THAT OPERATION BY THE POSTAL AUTHORITIES AND THE DEPARTMENT OF JUSTICE.

The postal inspectors in this very case established guidelines to avoid entrapment with the help of the Department of Justice (T.R. 95:19). The guidelines contain some of the features impressed by the Attorney general upon the Federal Bureau of Investigation. For instance, the individuals included in Project Looking Glass were to have responded to at least one regional testing program in the three years preceding the start of the project (T.R. 96, 97). However, according to the postal inspector who devised Project Looking Glass, Ray Mack, testing was the postal inspectors' way of contacting individuals who had either committed a crime or were in the act of committing a crime (T.R. 92). There is no evidence that Jacobson had done either, so he should not have been tested. Persons were targeted, according to Mack, only if their names had come from two independent sources (T.R. 96: 25) Individuals were included if their names were on a mailing list that had been seized by a postal inspector in the last seven or eight years (T.R. 96).

Petitioner's name had come to the postal inspectors' attention because it was on a single mailing list, Electric Moon's. He had been sent the American Hedonist Society and Midland's Data Research surveys because his name had appeared in this single source. Calvin Comfort sent petitioner's name to Ray Mack solely because it had been found in the Electric Moon search and he had responded to the two sexual attitude surveys. (T.R. 211:24). It does not appear that Comfort cared what petitioner had responded, just that there was a response.

Therefore, petitioner's name had not come from two independent sources, it came from one independent source,

Electric Moon. Two postal department undercover operations had been employed against Jacobson, American Hedonist Society and HINT neither of which had indicated that Jacobson had committed a crime, was engaged in a course of criminal conduct or was likely to commit a crime.

A third postal inspector's undercover operation, the "mirroring" technique employed by the "Carl Long" correspondence had also failed to produce evidence that Jacobson had violated the law or would violate it. The first contact between the postal inspectors and Jacobson had occurred about February 21, 1985 (E7) when Jacobson completed the Hedonist Society membership application.

The Select Committee's fears were realized. Jacobson had already suffered overpersistent solicitation and he did not qualify for inclusion in Project Looking Glass. The postal inspectors certainly had no reason to believe that he was either engaging, had engaged or was likely to engage in illegal activity. Furthermore, the corrupt nature of Looking Glass does not appear to be reasonably clear to potentially naive subjects.

The Far Eastern Trading Company contact letter states that the customs service is trying to find "children's pornography" (E1). It states that the company has found that if material is given to "your post . . . a search warrant must be gotten in order to open your mail". It also says: "After Consultations with American Solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a Judge." The letter infers that it is illegal for Far Eastern Trading Company to import children's pornography. It does not make it clear that it is a crime for petitioner to receive it.

Title 18 Sec. 2252(a)(2) had been amended in 1984 to make it an offense to receive sexually explicit material depicting children. No. 98-292, Sec. 4, 98 Stat. 204.

Although ignorance of the law may be no excuse, if petitioner was unaware, as he testified, that it was a crime to receive *Boys Who Love Boys*, that would certainly bear on the intent required to prove predisposition. (T.R. 428:13).

To this, the Government has persistently responded that petitioner should hardly have been surprised to learn that receipt of child pornography is not an innocent act, *e.g. United States v. Freed*, 401 U.S. 601, 28 L.Ed.2d 356, 91 S.Ct. 112, (1972). The logical rejoinder to that is that until May 21, 1984, receipt of child pornography had never been against federal law, Nebraska did not have a statute making it an offense to possess it until July 9, 1988, Neb. Rev. Stat. Sec. 28-813.01, 1943 (Supp. 1988); Laws 1988, L.B. 117, § 7, effective date July 9, 1988, and the postal inspectors themselves had made it appear lawful.

VII. THE STANDARD ENTRAPMENT INSTRUCTION IN DEVITT AND BLACKMAR, VOL. 1 *FEDERAL JURY INSTRUCTIONS*, SEC. 13.13 WHICH HAS BEEN APPROVED BY MANY OF THE FEDERAL CIRCUIT COURTS STATES THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD A PREVIOUS INTENT OR PURPOSE TO VIOLATE THE LAW BEFORE ANYTHING AT ALL OCCURRED RESPECTING THE ALLEGED OFFENSE.

Although there can be no doubt that the elements of entrapment are "predisposition" and "inducement", that does not say what constitutes evidence of predisposition, when it must appear or how "inducement" should be defined.

From what is apparently the first case "in which a Federal Court clearly recognized and sustained a claim of entrapment" (Justice Frankfurter dissenting in *Sherman*, 2 L.Ed.2d at p. 854), *Woo Wai v. United States*, 223 Fed. 412, (C.A. 9, 1915), the circuit courts have agreed that the Government needs some evidence that "Prior to the time when the detective first approached,

(the defendant) the defendant had committed or thought of committing an offense." *Woo Wai*, 223 Fed. at p. 414.

For years, the federal district courts have relied upon an entrapment instruction set forth in Devitt and Blackmar, Vol. 1, *Federal Jury Practice and Instructions*, § 13.13 (2d Ed., West, 1970, § 13.09, 3rd Ed., West, 1977). The instruction, which appears at page 290 and 291 of the second edition states:

> The defendant asserts that he was a victim of entrapment as to the offense charged in the indictment.
>
> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact the government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from the suspected person.
>
> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit

> an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

In *United States v. Brown*, 453 F.2d 101 (C.A. 8, 1971), at p. 106, the court said of this instruction:

> We find that the court's instruction properly follows the standards governing the issue of entrapment.

In *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983) at p. 816, n.9 the court refers to this identical instruction as "the standard charge." [3]

The instruction flatly tells the jury that if, "before anything at all occurred respecting the alleged offense", the accused had "no intent or purpose to violate the law" he has been entrapped. The instruction requires the Government to suspect that the defendant is engaged in some illicit conduct before the Government offers the defendant an opportunity to break the law. In a justice system based on reason, such a suspicion could hardly be understood to be an unreasonable suspicion, hunch or gut reaction, unsupported by some articulable circumstance.

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[3] The Devitt and Blackmar instruction has also been approved by the Eighth Circuit in *United States v. Pollard*, 483 F.2d 929 (C.A. 8, 1973); *United States v. Willard*, 518 F.2d 987 (C.A. 8, 1975); *United States v. Dawson*, 467 F.2d 668 (C.A. 8, 1972); *United States v. Haley*, 452 F.2d 398 (C.A. 8, 1971), *cert. denied*, 405 U.S. 977, 38 L.Ed.2d 97, 92 S.Ct. 1205 (1972) and *United States v. Shaw*, 570 F.2d 770 (C.A. 8, 1978). Versions of similar instructions substituting the words "reasonable cause to believe" for "suspects" have been approved in *Trice v. United States*, 211 F.2d 513 (C.A. 9, 1954); *United States v. Griffin*, 434 F.2d 978 (C.A. 9, 1971), *cert. denied*, 402 U.S. 995, 29 L.Ed.2d 160, 91 S.Ct. 2170 (1971), rehearing denied, 404 U.S. 877, 30 L.Ed.2d 124, 92 S.Ct. 27 and *Hansford v. United States*, 303 F.2d 219, 225 (D.C. Cir. 1962), citing *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947). When Judge Heaney wrote in his Eighth Circuit panel opinion that petitioner was entrapped as a matter of law because the Government did not have a reasonable suspicion that he had committed a crime or was likely to commit a crime, he was not making new law, he was remembering old law.

The most recent pocket part, the 1990 pocket part to Volume One of the 1977 (3rd) Edition repeats the quoted instruction at page 225 adding only this sentence at the end:

> The burden is on the government to prove beyond a reasonable doubt that the defendant was not entraped.

The text states the reason for the change thus:

> The instruction in the bound volume was challenged in *United States v. Johnson*, 590 F.2d 250 (7th Cir., 1979), rehearing en banc 605 F.2d 1025 (7th Cir), cert. denied 444 U.S. 1033, 62 L.Ed.2d 670, 100 S.Ct. 706, because it did not expressly state that the burden is on the government to prove beyond a reasonable doubt that defendant was not entraped. The instruction has been revised in the light of Johnson, even though the court, on rehearing en banc, withdrew the panel opinion and held that the text was sufficient.

Therefore, the Government needs to show more than that the defendant is a drug addict or a homosexual or wears leather and rides a Harley. The Government must show the defendant has an intent and purpose to violate the law before Government detectives offer an opportunity to break the law. Otherwise, the Government will not and should not prevail. Petitioner has persistently argued that an individual cannot be found willing to break the law upon evidence that he has a weakness, a taste or a congenital desire. Petitioner is right.

VIII. WHERE GOVERNMENT CONDUCT CREATES A SUBSTANTIAL RISK THAT AN OFFENSE WILL BE COMMITTED BY A PERSON OTHER THAN ONE READY TO COMMIT IT, INDUCEMENT HAS OCCURRED.

The red flag of inducement is raised when the Government incites to and creates crime in order to punish it. *Butts v. United States*, 273 Fed. 35, 18 A.L.R. 143 (C.A.

8, 1921), 213 Fed. at p. 38. "When the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells*, 77 L.Ed. at p. 417, the court must be wary of inducement. Where the Government's conduct has created a substantial risk that an offense would be committed by a person other than one ready to commit it, inducement is present. *United States v. Johnson*, 872 F.2d 612, 620 (C.A. 5, 1989); *United States v. Martinez*, 488 F.2d 1088 (C.A. 9, 1973). Government inducement can take the form of persuasion, fraudulent representations or pleas based on sympathy, need or friendship. *United States v. Oritz*, 804 F.2d 1161 (C.A. 10, 1986); *United States v. El-Gawli*, 837 F.2d 142 (C.A. 3, 1988).

The red flags fly in a stiff breeze in this case. Ray Mack's plan for intelligence gathering, the execution of which did not contemplate selling anything (T.R. 95:6) was administratively elevated in Washington, D.C. to a national program in which the postal authorities would actually solicit, advertise, sell, manufacture and deliver child pornography. The targets were completely passive. All they had to do was mail in their money, pick up the contraband at the post office and prepare to be indicted. It is hard to imagine a criminal enterprise more completely created and controlled by the government. In *United States v. Lard*, *supra*, the court observed

> . . . although the Supreme Court has sharply divided on the proper standard for applying the entrapment defense, it is generally agreed that 'the conduct with which the defense is concerned is the manufacturing of crime by law enforcement officials and their agents'. *Lopez v. United States*, 373 U.S. 427, 10 L.Ed.2d 462, 83 S.Ct. 1381, 1385 (1963); *Russell*, 411 U.S. at 439 (Mr. Justice Stewart, dissenting).

IX. APPLYING THE RECOGNIZED ELEMENTS OF INDUCEMENT AND PREDISPOSITION TO THE FACTS OF THIS CASE, SHOWS THAT THE PETITIONER WAS ENTRAPPED AS A MATTER OF LAW.

The courts have recognized several elements to be considered in deciding whether predisposition exists. In *United States v. Kaminski*, 703 F.2d 1004, 1008 (C.A. 7, 1983), the court began by noting that predisposition is:

> 'The defendant's state of mind and inclinations before his initial exposure to government agents,'

then turned its attention to the factors relevant in determining predisposition:

> Among these are the character or reputation of the defendant, including any prior criminal record; whether the suggeston of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. While none of the factors alone indicates either the presence or absence of predisposition, the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement.

The Eighth Circuit Court of Appeals in *United States v. Dion*, 762 F. at p. 687, created a comprehensive catalogue of the factors employed to determine predisposition:

> The lower courts have looked to a variety of factors in determining predisposition including: (1) Whether the defendant readily responded to the inducement offered. *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984); (2) the circumstances surrounding the illegal conduct, id; (3) the state of mind of a defendant before government agents make any

suggestion that he shall commit a crime, id., citing *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983) . . .; (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he was charged, *United States v. Vivano*, 437 F.2d 295 (C.A. 2, 1981) . . .; (5) whether defendant had already formed the 'design' to commit the crime, with which he is charged, id.; (6) the defendant's reputation, *Russell*, 411 U.S. at 443, 93 S.Ct. at 1648 . . .; (7) the conduct of the defendant during the negotiations with the undercover agent, *United States v. Costello*, 483 F.2d. 1366 (C.A. 5, 1973); (8) whether defendant had refused to commit similar acts on other occasions, *Kadis v. United States*, 373 F.2d 370 (C.A. 1, 1967); (9) the nature of the crime, *United States v. Jannotti*, 673 F.2d 578 (C.A. 3, 1982, en banc) . . .; and (10) 'the degree of coercion present in the instigation law officers have contributed to the transaction' relative to the 'defendants criminal background', *United States v. Townsend*, 555 F.2d, 152 (C.A. 7, 1977). In *United States v. Lard*, 743 F.2d at 1293, we relied on *Townsend* for the principal that 'determining a defendant's predisposition requires examination of the defendant's personal background to see where he sits on the continuum between the naive first offender and the street wise habitue'.

When the above factors are applied to the facts of this case, Jacobson did not readily respond to the advertisements in the Hedonist Society Newsletter nor did he complete the Midlands Data Research Survey when it was first sent him, nor did he initiate the "Carl Long" correspondence or pursue it.

He did, however, respond to the "Borderline" and "Looking Glass Stings" but without knowing that he was breaking the law. The circumstances surrounding Jacobson's illegal conduct were completely created and controlled by the Government. No evidence whatsoever exists that the petitioner's state of mind prior to the initiation

of either the Borderline or Looking Glass stings was criminally bent.

There was no evidence that Jacobson was engaged in an existing course of conduct and no evidence that he had formed a design to commit any crime, let alone, the one with which he would be charged. Petitioner's reputation in his community was excellent.

His conduct during negotiations with the undercover agent is really unassessable since direct negotiations did not occur. Petitioner had refused to commit similar acts on other occasions.

There was no coercion in the instigation by the postal inspector. His method was trick, not force.

The search warrant did not reveal a vast pedophilic collection. The Postal Authorities discovered only what they knew they'd discover. Petitioner is far toward naive first offender on the continuum between that and the street wise habitué.

All three branches of the Federal Government have recognized in varying ways the need to adopt rules which will scrupulously avoid entrapment in federal undercover operations. All have recognized to varying degrees that detectives should have a reasonable suspicion before soliciting or inducing individuals to commit a crime that the individual has committed a similar crime, is engaged in a course of criminal conduct, or is likely to commit such a crime in the future.

The Government had no such evidence in this case. Congress, of course, has never spoken on this subject and so the decision is left where it has always been, to the courts. *Matthews*, 99 L.Ed. 2d at p. 63. Jacobson's conviction is very dubious based on the eleven factors identified in *Dion, supra*. A fair count shows that Jacobson prevails on the undisputed evidence seven to two with one tie and one inapplicable. When the reasonable suspicion

requirement is imposed on the Government, then Jacobson's conviction is even more emphatically wrong.

CONCLUSION

This case should be reversed and dismissed.

Respectfully submitted,

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No. 90-1124

In the Supreme Court of the United States

OCTOBER TERM, 1991

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to his prosecution for receiving child pornography.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

Miscellaneous—Continued: Page

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc, Pet. App. 1a-19a, is reported at 916 F.2d 467. The panel opinion of the court of appeals, Pet. App. 20a-29a, is reported at 893 F.2d 999.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991 (a Monday), and was granted on April 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are reprinted in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of receiving through the mails material depicting minors engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to two years' probation and 250 hours' community service. A panel of the court of appeals reversed his conviction, but on rehearing the en banc court of appeals affirmed.

1. In May 1987 petitioner ordered a magazine depicting young boys engaging in sexual activity. The distributor of the magazine turned out to be an undercover postal inspector, and petitioner was arrested the next month, following a controlled mail delivery of the magazine. Pet. App. 2a; Tr. 214-229. That delivery was the culmination of an investigation of petitioner conducted by the United States Postal Inspection Service and the United States Customs Service in parallel undercover operations known as "Project Looking Glass" and "Operation Borderline." One of the purposes of those operations was to reduce the traffic in child pornography by identifying and prosecuting individuals on the demand side of the market —*i.e.*, the mail-order consumers of such material. Tr. 25-29, 79-87, 92-97, 145-149.

Petitioner came to the attention of the Postal Inspection Service after authorities searched a California pornographic bookstore (Electric Moon) in May 1984 and discovered petitioner's name on the store's mailing list. Pet. App. 2a; Tr. 21, 30, 71-74, 165, 172, 211, 345-346, 378. Petitioner had ordered two magazines and a brochure from the store in February 1984. Pet. App. 2a; Tr. 21, 258-260, 423-425, 460-462; GXs 5, 6. The brochure, which was entitled *The Everything Brochure*, GX 17, listed stores in

the United States and Europe that sold sexually explicit materials, including child pornography (referred to as "lolita" and "boy" material). The magazines, *Bare Boys I* and *Bare Boys II*, GXs 18A and 18B, consisted almost entirely of photographs of nude pre-teen and teenage boys in poses that focused on their genitalia. Interspersed among the photographs were written tributes to "the natural life" and family nudist camps, although the magazines contained no photographs of men, women, or girls. Pet. App. 2a; Tr. 232, 252-257. The only advertisement in the magazines was one for two other series of magazines published by the same outfit: a five-issue series entitled *Nudist Angels*, the covers of which appear in the ad and feature young girls, and a two-issue series entitled *Nudist Children*. See GX 18A.[1]

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[1] Petitioner's characterization of *Bare Boys I* and *II* as "nudist magazines depicting boys in their teens and early twenties in outdoor settings," Pet. 5-6, is belied by the magazines themselves, most of the subjects of which are obviously younger children. Moreover, the characterization in petitioner's brief is at odds with petitioner's own trial testimony, in which he admitted that the magazines depicted very young boys. Tr. 462-463.

Petitioner's claim that the trial court itself was "doubtful," Br. 14-15, that *Bare Boys I* and *II* were anything other than mere "nudist" magazines is also misleading. When the district court referred to the magazines as "nudist magazines that talked about health and that type of thing," Tr. 236, the court had not yet seen the magazines, *ibid.* ("I, of course, have not seen the magazines."). Once the court acceded to the prosecutor's request to review the magazines, Tr. 238, the court had no trouble concluding that they were "lascivious" within the meaning of 18 U.S.C. 2256(2)(E). Tr. 252. See also Tr. 386-387 (district court's ruling rejecting petitioner's motion for a judgment of acquittal). The court therefore admitted the magazines into evidence, cautioning the jury that "this evidence is received only * * * to show what predisposition, if any, the defendant may have had towards the receipt

Based on petitioner's purchase of these publications, in late January 1985 a postal inspector sent petitioner a letter from a fictitious organization called the American Hedonist Society (AHS), as well as a membership application that included a survey on sexual attitudes. GX 7. The letter described the society as one whose members believe that "pleasure and happiness is the sole good in life" and that "we have the right to read what we desire" without restrictions set by "an outdated puritan morality." Members would supposedly be able to correspond with others of similar views and would receive a quarterly newsletter entitled "It's a Small World." Petitioner applied for membership in the society in February 1985, remitting the $4 membership fee, certifying that he would keep all information received from the society in strict confidence, and noting in response to a question on the survey that he enjoyed material on pre-teen sex. Pet. App. 2a; Tr. 165-168, 174-175, 346, 469-471.[2]

In response to petitioner's request for enrollment in AHS and his avowed interest in material on pre-teen sex, the postal inspector sent him a letter from a fictitious company, Midlands Data Research (MDR), on May 27, 1986. GX 8. The letter described MDR as a firm seeking to hear from people

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of this type of material." J.A. 4. The jury was also informed of the parties' stipulation that, "at the time the defendant received the *Bare Boys* magazines, the receipt of visual depictions of minors engaged in sexually explicit conduct was not a violation of federal law. The parties do not agree as to whether or not the magazines * * * show minors engaged in sexually explicit conduct." Tr. 21.

[2] That question and response were the only items on the AHS survey that were admitted into evidence. Tr. 469-471, 546-547.

who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [*sic*] age." *Ibid.* The letter directed those who are "not interested in any of the sexually fulfilling situations mentioned" to "throw this letter away," and stated that those who were "interested in sharing with others of similar interests[] your experiences with the youth of your community" could write MDR. *Ibid.* Petitioner promptly replied. On May 31, 1986, petitioner wrote at the bottom of the MDR letter: "Please feel free to send me more information. I am interested in teenage sexuality. Please keep my name confidential." *Ibid.*; Pet. App. 2a; Tr. 180, 210-212, 335, 337, 345-346, 356-357, 366, 378.

The postal inspector responded to that communication from petitioner in late July 1986 by sending him a letter, DX 102, and a survey, GX 9, purportedly from the Heartland Institute for a New Tomorrow (HINT). The letter described HINT as a lobbying organization founded "to protect and promote sexual freedom and freedom of choice," and seeking "to eliminate any legal definition of 'the age of consent'" and "to repeal all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape." DX 102. The letter indicated that HINT had commissioned MDR to send petitioner a survey and that petitioner had failed to return it.

In early August 1986, petitioner initialed and returned the HINT letter with the following message typed in capital letters at the top: "Note: I have not been asked by you before to participate in an attitude survey. I did receive a mailing from you in regards to sexual interests which I replied to. I am returning your current survey filled out. Thanks. Please let me hear from you if other surveys will be

conducted. Sincerely, Keith." *Ibid.*[3] On the survey form, petitioner noted that he had a greater than average interest in material on "pre-teen sex—homosexual" by circling the number "2" on a scale ranging from "1" for very interested to "5" for least interested. GX 9.[4] The survey form stated that it was not necessary for subjects to provide their names, but that those who did so might "be entitled to receive additional materials and/or benefits from the organization that commissioned this survey." GX 9, at 5. Petitioner wrote his name and address below that notice. *Ibid.*; Pet. App. 2a; Tr. 366-372, 376-378, 471-473.

In response to this additional confirmation of petitioner's interest in material on pre-teen sex, the postal inspector, posing as HINT's director, sent him a thank-you letter accompanied by five names and addresses of persons whom the letter described as having backgrounds and interests similar to petitioner's. DX 113. Each name was actually a pseudonym for the postal inspector. Using one of the pseudonyms, "Carl Long," the postal inspector wrote to petitioner in mid-September 1986, expressing his support for HINT and his interest in sports, hiking, and collecting erotic literature. GX 11.[5] Petitioner wrote back, expressing his support for HINT, describing his interests ("primarily" in "male-male

[3] Postal Inspector Comfort testified that he had mistakenly sent petitioner a form letter and questionnaire from HINT, instead of from MDR. Tr. 367, 371-372.

[4] That was the only item on the HINT survey that was admitted into evidence. Tr. 472-473, 546-547.

[5] Postal Inspector Comfort explained that this technique is known as "mirroring." It involves the use of communications that reflect the interests of the addressees in an attempt to obtain information. Tr. 342, 343.

items"), and stating that he "collect[s] erotica. I used to collect mostly magazines but I have purchased a VCR and now collect or rent video tapes." Petitioner asked "Carl" to keep corresponding with him. GX 12. "Carl" again wrote petitioner, GX 13, who again responded, GX 14. In his reply, petitioner described several erotic video companies "I do business with," *ibid.*, and he ended his letter with the salutation, "[h]ope to hear from you," GX 14. "Carl" wrote petitioner once more in mid-October 1986. GX 15. When petitioner did not answer that letter, the correspondence ceased. Pet. App. 2a; Tr. 340-344, 365, 373-376, 425-426.

The Customs Service, through its consultations with the Postal Inspection Service, learned of petitioner's purchase of *Bare Boys I* and *Bare Boys II* and of his declared preference for material on pre-teen sex. Customs joined in the investigation of petitioner, and in March 1987 sent him a brochure, GX 22, from a fictitious Canadian company called Produit Outaouais. The brochure, which was patterned after genuine child pornography brochures, advertised photograph sets of "[y]oung boys in sex action fun" and noted "the worldwide ban and intense enforcement on this type of material." GX 22, at 1. The brochure further advised that "what was legal and commonplace is now an 'underground' and secretive service in order to continue serving collectors," that "[t]his environment forces us to take extreme measures to protect us and to insure your delivery," and that the recipient "will receive additional lists (unless you choose not to) at a later date." *Ibid.* The brochure instructed purchasers to place their payment into an envelope within an envelope, stated that orders would be shipped by com-

mon carrier "to avoid intrusion and for your privacy," and promised free replacement of items intercepted by Customs. *Ibid.*

On March 17, 1987, petitioner ordered a photograph set entitled "Piccolo" from the Produit Outaouais brochure. Along with the order form, petitioner enclosed a check for $16.50 and the following note, GX 24C: "I received your brochure and decided to place an order. If I like your product, I will order more later. I only have a box number but UPS delivers to me as they know where I live. Thanks, Keith." Customs never delivered the Piccolo set to petitioner. Pet. App. 2a; Tr. 27-53, 71-73, 75, 85-87, 271, 427-428, 443, 450. The mailing of the Produit Outaouais brochure was the Customs Service's only undercover contact with petitioner.[6]

Also in March 1987, petitioner answered a letter from the Far Eastern Trading Company, Ltd., another front for the Postal Inspection Service's undercover operation. The Far Eastern letter, GX 1, mentioned the efforts of the Customs Service to eliminate child pornography, noting that "many of you are denied a product because of that agency." The letter stated that by routing such material through the Virgin Islands, Far Eastern—which was supposedly located in Hong Kong—would be able to send it to Americans "without prying eyes of U.S. Customs

[6] The reason for the non-delivery is not stated in the record, although it appears that the decision not to deliver the set was made after consultation among the Customs Service, the Postal Inspection Service, and the United States Attorney's Office. See Tr. 52. Petitioner objected to the prosecutor's attempt to elicit the reason for the non-delivery from a witness from Customs, and the district court sustained the objection. Tr. 52-53. The Piccolo set was not admitted into evidence. Tr. 264.

seizing your mail." *Ibid.* Finally, the letter indicated that further information could be obtained by sending in the coupon and affirmation at the bottom of the letter. *Ibid.* Petitioner typed his name and address on the coupon, affirmed that he was not an undercover law enforcement agent trying to entrap Far Eastern,[7] and mailed the letter to Far Eastern's Virgin Islands address. *Ibid.*; Pet. App. 2a-3a; GX 1A; Tr. 92-94, 98-101, 151-152, 155-157, 427, 455.

In response to petitioner's request for more information about Far Eastern, in May 1987 the postal inspector sent him a catalog, GX 2, offering child pornography in the form of videotapes and magazines. Pet. App. 2a-3a; Tr. 102-105, 157.[8] To ensure that the catalog was realistic, it was assembled from child pornography catalogs seized in other investigations. Tr. 106-108, 118, 151. On May 5, 1987, petitioner ordered a magazine entitled *Boys Who Love Boys*, GX 4, a Danish publication. GX 3. The catalog described the contents of the magazine as follows: "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."[9] GX 2. Petitioner enclosed a check and a note, saying that he "[w]ill order other items later. I want to be discreet in order to protect you and me. KMJ." Pet.

[7] Pornography order forms routinely require such disclaimers. The Postal Inspection Service included one in its Far Eastern letter in order to lend authenticity to the offer of additional information. Tr. 99, 454-455.

[8] Had petitioner not requested further information, he would not have been sent the catalog. Tr. 99, 157, 213.

[9] The catalog offered the magazine for $25, a price comparable to what child pornography distributors would have charged for the magazine in the United States. Tr. 116-119.

App. 2a; GX 3; Tr. 109-111, 116-119, 157, 163, 214-216, 452, 457.[10]

Boys Who Love Boys was the subject of the controlled delivery that ended in petitioner's arrest on June 16, 1987. Pet. App. 2a; GXs 4, 4A; Tr. 114-115, 218-230, 429-436. While being interviewed in his home by a postal inspector, petitioner gave the inspector *Boys Who Love Boys* and *Bare Boys I* and *II*. Pet. App. 2a; Tr. 232-233, 256-257, 435-436. Also in petitioner's home were *The Everything Brochure*, the Far Eastern catalog, and the Produit Outaouais brochure from which he had ordered the undelivered Piccolo photograph set. Petitioner admitted to the postal inspector that he had expected the Piccolo set to contain pictures of naked boys 15 years old or younger. Tr. 21, 259-264, 451-452, 464.

2. In his defense, petitioner contended that he had been entrapped as a matter of law because, in his view, there was no evidence that he was predisposed to commit the charged offense. See, *e.g.*, Tr. 385. He also argued that the length and nature of the government's investigation of him were outrageous and should bar his conviction. Tr. 383-385. The trial court rejected those arguments, Tr. 386-388, but instructed the jury on the defense of entrapment, J.A. 11-13. The jury rejected the defense and convicted petitioner.

3. On appeal, petitioner reiterated his entrapment claim, although he conceded that he had "readily responded to the Looking Glass and Borderline probes," Pet. C.A. Br. 23, and that he had not been "coerced" into ordering *Boys Who Love Boys*, Pet. C.A. Reply

[10] Had petitioner not ordered anything from the catalog, the Postal Inspection Service would have terminated its investigation of him under Project Looking Glass. Tr. 109, 216.

Br. 6. With respect to his claim of outrageous government conduct, he argued that the government may not approach a person as part of an undercover operation unless it has reason to suspect the person of illegal conduct. Pet. C.A. Reply Br. 4.

Petitioner prevailed before a divided panel of the court of appeals. The majority held that "reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation." Pet. App. 25a. In the majority's view, *Bare Boys I* and *II* were merely "nudist" magazines, and petitioner's 1984 purchase of them neither indicated predisposition nor supplied reasonable suspicion that petitioner had committed a crime or was likely to do so. Pet. App. 21a-23a, 25a-26a. Although the majority found that in his response to the American Hedonist Society survey, petitioner had indicated a predisposition to receive sexually explicit materials depicting children, Pet. App. 21a, it concluded that the government could not rely on that evidence to rebut petitioner's entrapment claim, because the evidence was obtained only after petitioner had been illegally targeted by the undercover investigation. Pet. App. 24a, 26a. Hence, the majority ruled that petitioner had been entrapped as a matter of law. Pet. App. 26a.

Judge Fagg dissented. Pet. App. 26a-29a. He concluded that reasonable suspicion is not a prerequisite to an undercover investigation, and that, in any event, the government had reasonable suspicion here, based on petitioner's previous purchase of child erotica and a brochure outlining the methods of purchasing child pornography. Pet. App. 26a-29a.

4. On rehearing en banc, the court of appeals adopted the views of Judge Fagg. The court observed

that "[d]ue process limitations 'come into play only when the [g]overnment activity in question violates some protected right of the defendant.'" Pet. App. 3a (quoting *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion)). Since, in the court's view, petitioner did not have a constitutional right to be free from investigation, the initiation of the investigation did not violate petitioner's due process rights. Pet. App. 4a.

As for petitioner's argument that the government needed reasonable suspicion before investigating him, the court joined the other courts of appeals that have refused to impose such a requirement. Pet. App. 4a-5a. The court went on to find that the government's conduct in this case was not outrageous, because the government simply mailed surveys, letters, and catalogs to petitioner, and he voluntarily responded. As the court explained, "[t]he postal inspectors did not apply extraordinary pressure on [petitioner]. The inspectors merely invited [petitioner] to purchase pornographic material through the mail." Pet. App. 5a. Petitioner could have ignored the mailings, the court said, so the supposed entreaties to him involved far less pressure than face-to-face contacts. Pet. App. 6a.

The court likewise rejected petitioner's claim that he had been entrapped as a matter of law. The court found that the jury was justified in finding predisposition and in rejecting petitioner's entrapment defense, since the government had presented "ample evidence that the postal inspectors only provided [him] with opportunities to purchase child pornography and renewed their efforts from time to time as

[petitioner] responded to their solicitations." Pet. App. 6a-7a.[11]

Two judges dissented. Chief Judge Lay stated that petitioner was not predisposed to commit the offense and therefore was entrapped as a matter of law. Pet. App. 7a-8a. Judge Heaney reiterated his views, expressed in the panel opinion, that *Bare Boys I* and *II* did not evidence predisposition; that the government's investigative conduct in this case was outrageous; and that the government should be required to have reasonable suspicion of criminal activity before commencing an undercover investigation. Pet. App. 8a-19a.[12]

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[11] The quoted passage may be misleading, in that it suggests that the agents offered petitioner opportunities to buy child pornography throughout the 28-month period that they were in communication with him. In fact, petitioner was offered only two such opportunities, in March and May 1987, and he availed himself of both of them.

[12] Judge Heaney's dissenting opinion contains several factual errors that may have contributed to his conclusion that petitioner lacked predisposition. First, Judge Heaney stated that the American Hedonist Society's newsletter, which petitioner was told he would receive if he enrolled in AHS, "advertised sexually explicit materials for sale," and that petitioner never ordered any of those materials. Pet. App. 16a. In fact, the record does not indicate whether petitioner ever received a newsletter from AHS, much less what such a newsletter would have contained.

Second, Judge Heaney stated that the letter petitioner received from Midlands Data Research was accompanied by a questionnaire, that petitioner did not answer the questionnaire, and that his failure to do so prompted the letter from the Heartland Institute for a New Tomorrow asking him to reconsider his refusal to participate in the MDR survey. Pet. App. 16a-17a, 18a. In fact, the MDR letter was not accompanied by a questionnaire; petitioner therefore did not decline to respond to any MDR survey. Instead, he told MDR

SUMMARY OF ARGUMENT

A. Petitioner was not entrapped as a matter of law into receiving child pornography through the mail. Petitioner came to the attention of the Postal Inspection Service after his name was discovered on the mailing list of a supplier of child pornography from whom he had ordered a brochure on domestic and foreign purveyors of sexually explicit materials

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to "feel free to send me more information" because he was "interested in teenage sexuality." When the postal inspector sent him the letter from HINT, petitioner responded with a note stating that HINT had not previously asked him to participate in a survey, but that he had received a mailing from MDR on "sexual interests which I replied to," and that he would like to receive HINT surveys in the future. Pet. App. 2a; Tr. 366-372, 376-378, 471-473.

Third, Judge Heaney stated that the government presented petitioner with "a series" of opportunities to purchase child pornography through the mails. Pet. App. 18a. As we have noted, the "series" consisted of only two such opportunities, and petitioner seized both of them.

Finally, Judge Heaney stated that the fictitious companies through which the government offered to sell petitioner child pornography had assured him "that their mailings would not run afoul of United States Customs." Pet. App. 18a. In fact, neither offer left any room for doubt about its illegality. The Produit Outaouais brochure referred to "the worldwide ban and intense enforcement on this type of material," as well as "the extreme measures [needed] to protect us and to insure your delivery." See GX 22; Tr. 271. The letter from the Far Eastern Trading Company noted the Customs Service's efforts to eliminate child pornography and stated that for that reason, mail to and from the company had to be routed through the Virgin Islands. The letter required anyone interested in learning more about Far Eastern to affirm that he was not an undercover law enforcement agent attempting to entrap the company. See GX 1; Tr. 155-156. Even petitioner concedes, Br. 23, that "[t]he letter infers [*sic*] that it is illegal for Far Eastern Trading Company to import children's pornography."

and two magazines that graphically focused on the genitalia of naked boys. Undercover agents confirmed petitioner's appetite for such material through letters and surveys they sent him under the guise of fictitious organizations. As a result of petitioner's responses to those communications, in which he declared his preference for material on pre-teen sex, the Postal Inspection Service and the Customs Service offered petitioner two opportunities to order child pornography through the mail. Although both offers made their illegal nature clear, petitioner unhesitatingly accepted them, and with each order he noted that he intended to purchase more such material in the future. In addition, when petitioner ordered *Boys Who Love Boys*, the publication for which he was prosecuted, he stated that he intended to order other items later, but wanted to be "discreet."

Petitioner concedes that the government subjected him to no coercion, Br. 31; indeed, the agents had no face-to-face contacts with him, and he could easily have thrown away any communication in which he lacked interest. Thus, the government's investigative efforts did not create a substantial risk that a non-predisposed person would accept even one of its offers of child pornography, let alone both of them. As for predisposition, petitioner's prior purchases of child pornography, his declared preference for material on pre-teen sex, his immediate acceptance of both offers, and his stated intention to place more orders in the future overwhelmingly showed that he was ready and willing to receive sexually explicit depictions of children through the mail whenever he thought the risk of detection was low.

B. Petitioner was not entrapped as the result of an alleged violation of an internal guideline directing

agents who were conducting Project Looking Glass to investigate only persons whose proclivities for ordering child pornography came to the agents' attention through two sources. First, the two-source guideline is not judicially enforceable. Second, a violation of an internal guideline does not establish entrapment, since entrapment focuses principally on the defendant's predisposition. Third, the guideline was observed in this case.

C. Nor was entrapment established as a matter of law based on any alleged failure by the government to predicate its undercover investigation on reasonable suspicion that petitioner had committed or would commit a crime. The courts of appeals have uniformly rejected a reasonable suspicion requirement, and Congress has not chosen to impose one. In any event, the agents had reasonable suspicion based on petitioner's purchase of *Bare Boys I* and *II* months before the Postal inspectors first contacted him.

ARGUMENT

PETITIONER WAS NOT ENTRAPPED AS A MATTER OF LAW AS A RESULT OF THE GOVERNMENT'S INVESTIGATION

Undisputed evidence at trial established that, almost a year before undercover agents first contacted petitioner through the mails, petitioner had placed a mail order with a pornographer for two photomagazines showing nude pre-teen and teenage boys in poses focusing on their genitalia, and for a brochure listing domestic and foreign purveyors of sexually explicit materials. Undisputed evidence also showed that the agents later offered petitioner two opportunities to place mail orders for visual depictions of minors engaging in sexually explicit conduct, and that petitioner promptly took advantage of both opportunities. Nevertheless, petitioner contends that he was entrapped as a matter of law into purchasing that material. The en banc court of appeals correctly rejected his claim.

A. The Evidence At Trial Did Not Establish The Defense Of Entrapment As A Matter Of Law

1. *The entrapment defense focuses on the question whether the government caused an otherwise law-abiding citizen to commit a crime through inducements that the average person could not resist*

Entrapment is "a relatively limited defense." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). It is implicated only when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932).[13] The entrapment defense has two related elements: government inducement of the crime, and a lack of

[13] Accord *Sorrells*, 287 U.S. at 451 ("the controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials"); *id.* at 454 (opinion of Roberts, J.) ("Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."); *Russell*, 411 U.S. at 436 ("It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."); *Hampton* v. *United States*, 425 U.S. 484, 489 (1976) (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment).

predisposition on the part of the defendant to engage in the criminal conduct. Both elements must be satisfied to make out the defense. *Mathews* v. *United States*, 485 U.S. 58, 62-63 (1988); *Russell*, 411 U.S. at 435-436; *Sherman* v. *United States*, 356 U.S. 369, 376-378 (1958); *Sorrells*, 287 U.S. at 451.

a. Inducement is the threshold issue in the entrapment defense. The courts of appeals have uniformly held that the government has induced a person to commit an offense only if "the government's behavior was such that a law-abiding citizen's will to obey the law could have been overborne," *United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984)—if, in other words, government conduct created "a substantial risk that an offense would be committed by a person other than one ready to commit it," *United States* v. *Johnson*, 872 F.2d 612, 620 (5th Cir. 1989).[14] For that reason, proof of inducement is generally held to require more than proof of mere solicitation.[15] That view comports with this Court's rul-

[14] See, *e.g.*, *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 13; *United States* v. *Evans*, 924 F.2d 714, 717 (7th Cir. 1991); *United States* v. *Evans*, 910 F.2d 790, 801 (11th Cir. 1990), cert. granted on other grounds, 111 S. Ct. 2256 (1991) (No. 90-6105); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

[15] See, *e.g.*, *United States* v. *Osborne*, slip op. 14; *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990); *United States* v. *Johnson*, 872 F.2d at 621; *United States* v. *Marino*, 868 F.2d 549, 551-552 (3d Cir.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Rodriguez*, 858 F.2d 809, 812-813 (1st Cir. 1988); *United States* v. *Ortiz*, 804 F.2d at 1165; *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Burkley*, 591 F.2d 903, 911-912 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979). The Second Circuit takes the position that solicitation alone may constitute inducement, *United States* v. *Dunn*, 779 F.2d 157, 158 (1985), but that is because the Second Circuit uses a slightly different mechanism for allocating the burdens of production on the entrapment issue. See generally *Burkley*, 591 F.2d at 911-914 (explaining the Second Circuit's approach).

ings that "the defense of entrapment is not simply that the particular act was committed at the instance of government officials," *Sorrells*, 287 U.S. at 451, and that the defense is unavailable when government agents merely afford a person the opportunity or facilities to commit a crime, *id.* at 441.[16]

[16] See also *Mathews*, 485 U.S. at 66; *Russell*, 411 U.S. at 435; *Sherman*, 356 U.S. at 372; *id.* at 382 (Frankfurter, J., concurring in the result); *Osborn* v. *United States*, 385 U.S. 323, 331-332 (1966); *Lopez* v. *United States*, 373 U.S. 427, 436 (1963). See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(f)(4) (1986).

Even in its earliest consideration of the entrapment defense, this Court rejected the notion that government-initiated contacts, solicitations, and offers of opportunities to commit crimes constitute improper inducement. In *Grimm* v. *United States*, 156 U.S. 604 (1895), a government official solicited information about obscene material through the mails; the defendant was prosecuted when he responded to this solicitation. The Court rejected the defendant's challenge to the prosecution—even though the illegal material was "deposited in the mails at the instance of the government"—because "[i]t does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." 156 U.S. at 609, 610. See *id.* at 609-610. In *Casey* v. *United States*, 276 U.S. 413 (1928), the defendant provided morphine at the request of a government informant. The Court suggested that no entrapment defense would be available, since the defendant "was in no way induced to commit the crime beyond the simple request [of the informant] to which he seems to have acceded without hesitation and as a matter of course." *Id.* at 419. The government's initiation of the transaction, the Court added, was no different in sub-

Nor does the government's use of artifice, stratagem, pretense, or deceit establish inducement. Such devices are "frequently essential to the enforcement of the law," *Sorrells*, 287 U.S. at 441, especially in undercover investigations of contraband offenses and "consensual" or so-called "victimless" crimes.[17] Inducement is established only by a showing of at least " 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship,' " *United States* v. *Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985), or by "grave threats, * * * fraud * * *, or in the usual case in which entrapment is pleaded, by extraordinary promises—the sorts of promises that would blind the ordinary person to his legal duties," *United States* v. *Evans*, 924 F.2d 714, 717 (7th Cir. 1991).[18]

b. Even if the government engaged in conduct that constituted inducement, a defendant is not entrapped if his "criminal conduct was due to his own readiness and not to the persuasion of government agents," *Sherman*, 356 U.S. at 376-377, *i.e.*, when

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stance from an agent's "ordering a drink [from] a suspect bootlegger." *Ibid.*

[17] See also *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985); *Hampton* v. *United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring in the judgment); *Russell*, 411 U.S. at 432, 434-435; *Lewis* v. *United States*, 385 U.S. 206, 208-210 & n.16 (1966); *Lopez*, 373 U.S. at 434; *id.* at 465 (Brennan, J., dissenting); *Sherman*, 356 U.S. at 372.

[18] See also, *e.g.*, *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *McLernon*, 746 F.2d 1098, 1113-1114 (6th Cir. 1984); *United States* v. *Andrews*, 765 F.2d at 1499; *United States* v. *Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979); *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967).

the defendant was predisposed to engage in the criminal activity. *Hampton* v. *United States*, 425 U.S. 484, 488-489 (1976) (plurality opinion) (the defense may not "be based upon governmental misconduct in a case * * * where the predisposition of the defendant to commit the crime was established"); *id.* at 492 n.2 (Powell, J., concurring in the judgment); *Russell*, 411 U.S. at 436; *Sorrells*, 287 U.S. at 448. Because a person who "needed no persuasion" to commit a crime, *Masciale* v. *United States*, 356 U.S. 386, 388 n.3 (1958), is fully culpable, predisposition is "the principal element in the defense of entrapment," *Mathews*, 485 U.S. at 63; *Russell*, 411 U.S. at 433.

The issue of predisposition focuses on whether the defendant was an "unwary innocent" who was induced to commit a crime he would not otherwise have committed, or an "unwary criminal" who simply took advantage of the opportunity to commit a crime that he was predisposed to commit if given the chance. *Sherman*, 356 U.S. at 372. The inquiry is related to the inducement question, since a defendant may suggest the absence of predisposition "by demonstrating that he had not favorably received the government plan, and the government had to 'push it' on him, * * * or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate." *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, 474 U.S. 1064 (1986). But predisposition does not turn on the nature of the government's conduct; rather, it turns on whether the defendant was ready and willing to commit the crime. See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(b) (1986); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 13.09 (3d ed.

1977 & Supp. 1990) (a defendant is predisposed if he is "ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded"). Thus, a defendant can be predisposed even if he did not specifically contemplate breaking the law before coming into contact with an undercover law enforcement officer and even if he had never previously committed a similar crime. See, *e.g.*, *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 11; *United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Jannotti*, 673 F.2d 578, 603-604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). At the same time, the surest indication of predisposition is a defendant's unhesitating acceptance of the government's offer to commit a crime—or, as Judge Learned Hand described it, the defendant's "willingness to [commit the offense], as evinced by ready complaisance," *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (quoting *United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933)). In such a case, the defendant's conduct makes clear that he was "of a frame of mind such that once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion." *Williams*, 705 F.2d at 618; *Osborne*, slip op. 12.

2. The entrapment defense is generally left to the jury and may be decided by the court as a matter of law only when any reasonable jury would find that the defendant was entrapped

When the issue of entrapment is fairly raised by the evidence at trial, it is to be decided by the jury, not the court, unless the evidence establishes entrapment as a matter of law. *Mathews*, 485 U.S. at 63; *Sherman*, 356 U.S. at 377. Entrapment is established as a matter of law "only when the lack of predisposition is apparent from the uncontradicted evidence." *United States* v. *Thoma*, 726 F.2d 1191, 1197 (7th Cir.), cert. denied, 467 U.S. 1228 (1984). See *Sherman*, 356 U.S. at 373 (ruling that the defendant was entrapped as a matter of law by relying solely on the testimony of government's witnesses). The entrapment issue is generally for the jury not only because it is the body to make credibility judgments, but also because, as Judge Friendly once wrote, "the ensuing question of whether the Government has gone so far in causing the criminal conduct as to take the case outside the definition of the crime and to render punishment an act of injustice, is also highly suitable for determination by a jury, representing 'the voice of the country.'" *United States* v. *Riley*, 363 F.2d 955, 958 (2d Cir. 1966).

The only case in which this Court has found entrapment as a matter of law is *Sherman* v. *United States*, *supra*. That case involved substantial face-to-face contacts and a reluctant defendant who plainly lacked the predisposition to commit the crime of which he was convicted. In *Sherman*, the defendant, a recovering drug addict undergoing treatment for his addiction, was lured back into taking drugs by a government informant who repeatedly importuned to defendant face-to-face for drugs, purportedly to allay the agonies of the informant's own withdrawal. 356 U.S. at 371, 373. The Court found it "patently clear" that the defendant had been induced into selling narcotics by the informant, *id.* at 373, who had "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing

crimes he otherwise would not have attempted," *id.* at 376, simply in order to alleviate the informant's "presumed suffering," *id.* at 371.

By contrast, the Court has declined to find entrapment as a matter of law, in spite of active government involvement in the offense, as long as the defendant was predisposed to commit the crime. In *Russell*, an undercover narcotics agent furnished the defendant with an ingredient essential to the manufacture of methamphetamine. The defendant was then prosecuted for the unlawful manufacture and sale of the drug. The defendant conceded that he had been predisposed to commit the charged offenses, but nevertheless maintained that he was entrapped as a matter of law based solely on the type and degree of government conduct, regardless of his predisposition. The Court rejected that claim, noting that "the principal element" in the entrapment defense is "the defendant's predisposition." 411 U.S. at 433. The Court held that the "[r]espondent's concession * * * that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment." *Id.* at 436.

In *Hampton* the Court again made it clear that a finding of predisposition defeats the entrapment defense, despite extensive government involvement in the crime. There, a government informant furnished the defendant with drugs, which the defendant then resold to another government agent. In spite of the government's pervasive involvement in the crime, the Court held that because the defendant was predisposed to distribute drugs, he was not entrapped. 425 U.S. at 488-490 (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment).

3. The evidence in this case does not show that overbearing government inducement caused an innocent person to break the law

Applying these principles to this case, it is clear that petitioner was not entrapped as a matter of law. The evidence at trial showed that petitioner was ready and willing to contribute to "the poisonous 'kiddie porn' market," *New York* v. *Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring), by ordering such material when the opportunity presented itself. The undercover operation merely exposed petitioner's predisposition to engage in such conduct and gave him opportunities to do so. The facts of this case do not remotely resemble those of *Sherman*, and are not even as favorable for the defense as were the facts in *Russell* and *Hampton*. Accordingly, the district court could not have entered a judgment of acquittal on the basis of entrapment without impermissibly intruding on the jury's fact-finding prerogative.

a. Petitioner concedes that he was neither "coerced" nor "force[d]" into committing the crime. Br. 31; see also Pet. C.A. Reply Br. 6. He maintains instead that through "overpersistent solicitation," Br. 23, the Postal agents "trick[ed]" him, Br. 31, into believing that he could legally receive child pornography through the mail. That claim is refuted by the record.

The evidence shows that the agents offered petitioner only two opportunities to purchase child pornography through the mail. Both offers were accompanied by unambiguous warnings about the illegality of the offered material, yet petitioner acted without hesitation in taking advantage of both.

First, petitioner ordered the Piccolo photograph set, which a brochure described as showing "[y]oung

boys in sex action fun." The brochure warned of "the worldwide ban and intense enforcement on this type of material." In addition, it noted that "what was legal and commonplace is now an 'underground' and secretive service," it mentioned the need for "extreme measures" to protect the company and the purchaser, and it set forth special procedures for ordering and delivering the materials. GX 22.

Second, two months later petitioner ordered *Boys Who Love Boys*, which a catalog, GX 2, described as a magazine depicting "11 year old and 14 year old boys get[ting] it on in every way possible," including "[o]ral, anal sex and heavy masturbation." See GX 4. Petitioner purchased that magazine even though the letter from the "distributor," the Far Eastern Trading Company, explicitly advised that the Customs Service was working to eliminate child pornography, that the ordered material would have to be routed through the Virgin Islands to ensure its delivery, and that before the material could be sent to petitioner he would have to affirm that he was not an undercover agent trying to entrap the company. GX 1. Those facts conclusively rebut petitioner's claim that the government "trick[ed]" him into ordering child pornography by making it appear that he could do so legally through the mail. Br. 31.

Nothing about the agents' contacts with petitioner gave rise to the type of inducement that an ordinary person would not feel free to reject. The agents' early contacts with petitioner, which included no offers of child pornography, consisted entirely of letters and surveys that did nothing more than give petitioner opportunities to provide information about his interests, to correspond with apparently like-minded people, and to obtain further information about Far Eastern, which identified itself as a company that dealt in child pornography. Those contacts did not even remotely constitute the type of conduct that would provoke an otherwise law-abiding citizen to break the law.

It makes no difference in this case that the pre-offer contacts with petitioner occurred over a 21-month period, January 1985 to October 1986. Throughout that period petitioner not only responded to the contacts but sought to continue them.[19] What is more, none of the contacts were face-to-face. Petitioner was able to evaluate each communication in the comfort and privacy of his own home, without any pressure whatever to respond, much less to respond immediately. Petitioner could have rid himself of any of the undercover communications at any time he chose, with no more effort than a trip to the trash can.[20]

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[19] See *United States* v. *Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989) (upholding five-year American Hedonist Society/Operation Borderline investigation against claim of outrageous government conduct where defendant acted "in concert" with government during that time); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 (4th Cir. 1988) (upholding three-year Project Looking Glass investigation against claim of outrageous government conduct where the defendant kept responding to contacts).

[20] See *United States* v. *Thoma*, 726 F.2d at 1197 (defendant's sale of pornography through fictitious undercover organization was not product of government inducement where organization's mailings to him were "spread out over a period of time and, unlike personal contact, could easily be ignored by one not interested in [them]"); *United States* v. *Mitchell*, 915 F.2d 521, 526 (9th Cir. 1990) (defendant who had had no face-to-face contacts with agents ordered child pornography from Far Eastern catalog "willingly and without pressure"), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Chin*, 934 F.2d 393, 397-398 (2d Cir. 1991) (rejecting claim

The two brochures that provided petitioner with opportunities to purchase child pornography likewise did not constitute an "inducement" as that term is used in the law of entrapment. The brochures contained no threats or importunings, and they were purposely designed to mimic the brochures circulated by child pornography firms, so there was nothing atypical about the undercover materials that would make it more difficult than normal for a person receiving the brochure to ignore them. In short, nothing about the government's conduct deprived petitioner of the opportunity to exercise his free will or "blind[ed] [him] to his legal duties." *Evans*, 924 F.2d at 717.

b. With respect to predisposition, the evidence overwhelmingly established that petitioner was ready and willing to receive child pornography through the mail whenever he thought the risk of detection was low. Petitioner appears to concede his appetite for such material, Br. 14, 16, 17,[21] and he demonstrated

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that postal authorities invaded defendant's privacy by mailing him unsolicited Far Eastern catalog in effort to discover whether he was likely to violate the law).

[21] At trial, petitioner claimed that he had been "quite shocked" to see how young the boys were in *Bare Boys I* and *II*. Tr. 463. He admitted, however, that when he ordered *Boys Who Love Boys* he knew that he would receive child pornography. Tr. 452-453. Petitioner's contention, Br. 7-8, 14, that evidence of his purchase of *Bare Boys I* and *II* and of his responses to the undercover contacts should not have been admitted because they showed his "sexual preferences rather than his criminal intent," Br. 17, is utterly without merit. Petitioner's mail-order purchase of material with a graphic focus on children's genitalia and his declared interest in material on preteen sex were directly relevant to his predisposition to commit the offense of receiving visual depictions of minors engaged in sexually explicit conduct. *United States* v. *Johnson*, 855 F.2d 299, 304 n.4 (6th Cir. 1988); *United States* v. *Gantzer*, 810 F.2d 349, 352 (2d Cir. 1987).

his willingness to obtain it through the mail when, months before the government contacted him, he ordered *Bare Boys I* and *II* and *The Everything Brochure* from a California pornographer. The *Bare Boys* magazines were compilations of photographs of naked pre-teen and teenage boys displaying their genitals. Although, as petitioner notes, Br. 14, it did not violate federal law for him to receive such magazines in February 1984,[22] that fact does not deprive his mail-order purchase of those magazines of evidentiary significance on the issue of his predisposition to receive *Boys Who Love Boys*, the magazine on which his conviction was based. *United States* v. *Gantzer*, 810 F.2d 349, 352 (2d Cir. 1987) (defendant's "propensity to receive pornographic—though not necessarily legally obscene—materials through the mail is probative of his predisposition to send legally obscene photographs"); *United States* v. *Johnson*, 855 F.2d 299, 304 n.4 (6th Cir. 1988). The reason is that proof of predisposition is not limited to evidence of criminal offenses. See, *e.g.*, *Osborn*, 385 U.S. at 332 n.11; *Gantzer*, 810 F.2d at 352; *Andrews*, 765 F.2d at 1499. See also 1 W. LaFave & A. Scott, *supra*, § 5.2(d); Marcus, *Proving Entrapment Under the Predisposition Test*, 14 Am. J.

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[22] It became illegal to receive non-obscene child pornography even for a non-commercial purpose in May 1984, the month that petitioner's name was discovered on the California pornographer's mailing list. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. Congress has since passed additional legislation to deal with this problem. The recent congressional efforts to combat child pornography are described in the brief filed by Representative Bliley and other Members of Congress as amici curiae.

Crim. L. 53, 84-85 (1987). Because petitioner sought an "acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Sorrells*, 287 U.S. at 451-452.[23]

Petitioner's responses to the letters and surveys that the undercover agents sent to him further proved his predisposition. There were eight such contacts. With respect to six of them, petitioner not only re-

[23] Amicus ACLU suggests that the government cannot rely on petitioner's purchase of *Bare Boys I* and *II* as proof of his predisposition, because "even the government concedes [that those magazines were] entitled to constitutional protection." ACLU Amicus Br. 14 n.6; *id.* at 13-15. That argument is flawed in two respects. First, it is based on a misreading of the record. The parties stipulated at trial that "at the time [petitioner] received the *Bare Boys* magazines, the receipt of visual depictions of minors engaged in sexually explicit conduct was not a violation of federal law." Tr. 21. That stipulation does not concede that the magazines were protected by the First Amendment, and in fact they were not. As the Court held in *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), possession of child pornography may be outlawed without offending the Constitution. Second, the ACLU is incorrect in asserting that if certain conduct is protected by the First Amendment, the prosecution may not make any evidentiary use of that conduct at trial. Even if conduct is protected, so that it may not be the subject of prosecution, it may nonetheless be relevant and admissible as evidence at a trial. See *United States* v. *Abel*, 469 U.S. 45 (1984) (membership in a prison gang is a legitimate basis for impeachment of a witness even if the witness could not be convicted for belonging to such a gang). For that reason, the First Amendment does not prohibit the use of pornographic (but not unlawful) materials involving children to prove a defendant's predisposition to commit a child pornography offense.

sponded, but also requested that the contacts continue. Petitioner sought information on "teenage sexuality" from Midlands Data Research, which indicated that it was seeking to hear from those "who believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [*sic*] age." GX 8. He completed the two surveys sent him by the "American Hedonist Society" and the "Heartland Institute for a New Tomorrow," declaring in both his preference for material on pre-teen sex. He asked to receive future surveys from HINT, which purported to be lobbying against age-of-consent laws for sexual activities. He wrote for further information from the Far Eastern Trading Company, which claimed to have devised a method of evading Customs seizures of child pornography. He remitted a membership fee to AHS, which offered to facilitate correspondence among members. And he answered two letters from the pseudonymous "Carl Long," in which he disclosed that he collected erotic literature and videotapes.

To be sure, petitioner did not respond to two of the eight contacts. He let pass HINT's invitation to initiate correspondence with HINT members, and he did not answer "Carl Long's" third letter, which the postal inspector sent after petitioner had responded to the first two letters and had asked "Carl" to write back to him. Petitioner's failure to respond to two of the contacts, however, does not significantly detract from petitioner's pattern of affirmative responses to the undercover contacts or otherwise show his lack of predisposition to receive child pornography. Petitioner responded enthusiastically to most of the undercover contacts, especially those offering sexually explicit materials; the two contacts to which he did not respond both involved correspondence by let-

ter with others, an activity that simply may not have interested petitioner as much as obtaining sexually explicit material. See *Thoma*, 726 F.2d at 1197 (defendant's reluctance to respond to apparent opportunities to make contact with persons expressing sexual tastes similar to his "cannot be equated with reluctance at committing the prohibited mailings"). In fact, petitioner's silence on those two occasions undermines his entrapment claim in one respect by showing that the agents' overtures were in no sense coercive; that petitioner was fully capable of ignoring them when he chose; and that when he seized the only two opportunities to purchase child pornography that the agents presented to him, he did so because he was ready and willing to commit the crime, not because the agents had pressured or beguiled him into committing it.

Petitioner's decision to order the "Piccolo" photographs from a brochure describing them as "[y]oung boys in sex action fun," GX 22, at 1, confirmed his predisposition to receive child pornography through the mail. So, too, did petitioner's accompanying note stating that he would place more mail-orders in the future if he liked the "product," GX 24C, and his later admission to the postal inspector that he expected the Piccolo set to contain pictures of naked boys 15 years of age and younger, Tr. 264.

Finally, the manner in which petitioner responded to the brochure that offered the magazine *Boys Who Love Boys* demonstrates his predisposition to order child pornography through the mail when given the opportunity to do so. He evinced no reluctance to order the magazine, which he ordered almost as soon as he received the brochure. Moreover, only someone who "needed no persuasion" to commit the crime, *Masciale*, 356 U.S. at 388 n.3, would enclose a note

with his order, as petitioner did, indicating that he would purchase additional materials in the future, but in the meantime "want[ed] to be discreet to protect you and me," GX 3. That evidence of petitioner's eagerness to place additional mail orders from a brochure that described the materials as featuring a variety of sex acts involving children thoroughly undermines his present attempt to portray himself as an "unwary innocent" who was entrapped into receiving such material.

c. Courts of appeals that have considered cases similar to this one have recognized the necessity and justification for undercover child pornography investigations.[24] "[P]urchasing child pornography, by in-

[24] The courts of appeals have consistently rejected entrapment and due process challenges to undercover operations like this one. See, *e.g.*, *United States* v. *Chin*, 934 F.2d at 397-401 (three-year postal investigation with Far Eastern letter, catalog, questionnaire, and correspondence); *United States* v. *Osborne*, slip op. 6-15 (postal investigation with questionnaire); *United States* v. *Moore*, 916 F.2d 1131, 1136-1140 (6th Cir. 1990) (postal investigation with correspondence, telephone calls); *United States* v. *Mitchell*, 915 F.2d 521, 522-526 (9th Cir. 1990) (Project Looking Glass investigation with Far Eastern letter, catalog, and questionnaire), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Duncan*, 896 F.2d 271, 275-277 (7th Cir. 1990) (Operation Borderline investigation with Produit Outaouais brochure; postal investigation with survey); *United States* v. *Musslyn*, 865 F.2d 945, 946-947 (8th Cir. 1989) (five-year Operation Borderline investigation with membership applications, correspondence, and brochure); *United States* v. *Dornhofer*, 859 F.2d 1195, 1200 (4th Cir. 1988) (Operation Looking Glass); *United States* v. *Johnson*, 855 F.2d 299, 303-305 (6th Cir. 1988) (postal investigation with extensive correspondence); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 (4th Cir. 1988) (three-year Project Looking Glass investigation with correspondence, Far Eastern letter and catalog); *United States* v. *Driscoll*, 852

creasing the demand for such materials, serves to further the sexual exploitation of minors," *United States* v. *Chin*, 934 F.2d 393, 399 (2d Cir. 1991), and "[g]overnment undercover operations are severely needed to prevent and deter those who produce, sell, purchase or traffic" in such material, *Moore*, 916 F.2d at 1139.[25]

The United States is the world's most lucrative market for child pornography, and that market is tied to the sexual exploitation of children internationally. See Note, *Can We End the Shame?—Recent Multilateral Efforts to Address the World Child Pornography Market*, 23 Vanderbilt J. Transnat'l L. 435, 447-449 (1990). While "the production of pornographic materials is a low-profile, clandestine industry, the need to market * * * requires a visible apparatus of distribution." *Ferber*, 458 U.S. at 760. Thus, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market." *Ibid.*; see also *Musslyn*, 865 F.2d at 947

F.2d 84, 85-87 (3d Cir. 1988) (Project Looking Glass investigation with Far Eastern letter and catalog); *United States* v. *Nelson*, 847 F.2d 285, 287-288 (6th Cir. 1988) (postal investigation with multiple letters and questionnaires); *United States* v. *Rubio*, 834 F.2d 442, 450-451 (5th Cir. 1988) (postal investigation with questionnaires, correspondence); *United States* v. *Esch*, 832 F.2d 531, 538-539 (10th Cir. 1987) (postal investigation with questionnaires, correspondence), cert. denied, 485 U.S. 908 (1988); *United States* v. *Thoma*, 726 F.2d at 1198-1199 (postal investigation with survey).

[25] Child pornographers "commit serious crimes which can have devastating effects upon society and, most importantly, upon children who are sexually abused." *United States* v. *Moore*, 916 F.2d at 1139. See Comment, *Behind Closed Doors—The Clandestine Problem of Child Pornography*, 21 Creighton L. Rev. 917, 917-918 & nn.1-23 (1988), regarding the harms suffered by children used in the production of child pornography.

("The nature of the production, distribution, and sale of child pornography itself justifies this type of undercover operation [American Hedonist Society and Operation Borderline] to be utilized against those who order it."); *Goodwin*, 854 F.2d at 37 (same, Project Looking Glass).

Because "the transmission of child pornography through the mails occurs within a shroud of secrecy," *Johnson*, 855 F.2d at 305, undercover operations are necessary "if our society is ever to be free of child pornography and the heinous crime of child sexual abuse," *Moore*, 916 F.2d at 1139-1140. See also *Duncan*, 896 F.2d at 276 ("effective enforcement of laws involving the 'consensual' crime of receiving child pornography shipped in foreign or interstate commerce will generally require, as a practical necessity, the controlled delivery of items of contraband to individuals * * * who are predisposed to commit this crime"); *Chin*, 934 F.2d at 400 n.6. The investigative methods employed in this case therefore cannot fairly be characterized as pointless efforts to target an individual whose prosecution will do nothing to promote the interests underlying the federal child pornography laws.

B. Petitioner Was Not Entrapped As A Matter Of Law On The Ground That The Government Violated Internal Guidelines Regulating The Conduct Of Undercover Investigations

Petitioner maintains that he was entrapped as a matter of law on the ground that the Postal Inspection Service violated the internal guidelines of its nationwide undercover operation, Project Looking Glass, when it offered petitioner the opportunity to purchase child pornography through the Far Eastern catalog. Petitioner contends that under the guide-

lines, Project Looking Glass would contact only individuals whose interest in child pornography had come to the attention of postal inspectors from two different sources; that the rule was violated in his case; and that petitioner was therefore entrapped as a matter of law. Br. 22-23. That claim lacks merit, for several reasons.

First, an agency's standards concerning the exercise of its investigative and prosecutorial duties are not judicially enforceable unless compliance with those standards is required by a statute or the Constitution. *United States* v. *Caceres*, 440 U.S. 741, 749-755 (1979); *United States* v. *Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Petitioner does not suggest that the two-source guideline was statutorily mandated, or that its observance was required as a matter of due process. There would be no basis for such a claim in any event, because it was plainly not the case that the internal guideline was "promulgated for [petitioner's] guidance or benefit * * * [or] that he relied on [it], or that its breach had any effect on his conduct." *Caceres*, 440 U.S. at 752-753.

Second, an agency's violation of one of its own purely discretionary guidelines cannot establish entrapment as a matter of law, because compliance or noncompliance with a guideline is irrelevant to the issue of predisposition. Cf. *Thoma*, 726 F.2d at 1199 n.3. Petitioner's argument rests on the premise that the postal agents' conduct itself can establish entrapment as a matter of law, regardless of his predisposition. As we have noted, the Court rejected similar claims in *Russell* and *Hampton*, where it held that a jury's finding or the defendant's concession of his predisposition forecloses the argument that the defendant has been entrapped as a matter of law, even if the government is substantially involved in the corpus delicti of the charged offense. See 411 U.S. at 436; 425 U.S. at 487 n.3, 490 (plurality opinion).

Finally, the Postal Inspection Service did not violate the two-source guideline in this case. The postal inspectors investigating petitioner did not refer his name to Project Looking Glass until February 1987. Tr. 93-94, 145, 210, 212. Before then, petitioner had been investigated by one of the Postal Inspection Service's regional offices. Petitioner had come to the attention of the regional office in January 1985 when his name was discovered on the mailing list of the California pornography outfit from which he had ordered *Bare Boys I* and *II*. Based on that discovery, the regional office sent petitioner letters and surveys in an effort to confirm what his prior purchase had suggested, *i.e.*, that he was using the mails to obtain child pornography. See Tr. 165-172, 333-343, 366-372, 376-378. Only after petitioner gave affirmative responses to the letters and surveys did the postal inspectors refer his name to Project Looking Glass for contact by the Far Eastern Trading Company. That internal referral thus complied with the Project's two-source guideline. See Tr. 211-212, 345-346, 378.

C. The Government Is Not Required To Have A Reasonable Basis To Believe A Person Is Engaged In Criminal Activity Before It May Approach That Person As Part Of An Undercover Investigation

Petitioner and amici claim that petitioner's conviction must be reversed because, before the postal inspectors began corresponding with petitioner, they lacked reasonable suspicion to believe that he would violate the law. Br. 26-27, 31-32; ACLU Amicus Br.

5-12, 16-19. That question, however, is not properly before this Court. The first question presented in petitioner's certiorari petition was whether the government must have reasonable suspicion with regard to a particular person before it may approach him as part of an undercover investigation, and the Court did not grant certiorari on that question. Nevertheless, we will address that argument briefly in the event that the Court considers it pertinent to the proper resolution of the issue on which the Court granted review.

1. The threshold flaw in petitioner's argument is the same as the one discussed in Point B: it ignores the defendant's predisposition to commit the crime. Petitioner and amici argue in effect that even a person who is eager to break the law at every turn is nevertheless entitled to go free if the government lacked reasonable suspicion that he was so inclined when it first approached him. That argument is inconsistent with the firmly settled principle that a defendant cannot establish entrapment if the evidence demonstrates his predisposition.

2. The argument made by petitioner and amici also has been advanced as a substantive due process claim, but the Due Process Clause does not impose on government investigations the reasonable suspicion requirement that petitioner and amici seek. Due process "come[s] into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton*, 425 U.S. at 490 (plurality opinion); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980). Yet, as the court of appeals observed, a person "has no constitutional right to be free of investigation." Pet. App. 4a. Thus, when "the conduct of the investigation itself does not offend due

process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait." *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988).[26]

For these reasons, the courts of appeals have consistently rejected the notion that the Due Process Clause or the Fourth Amendment bars suspicionless police undercover investigations.[27] Those decisions are consistent with this Court's recognition that the entrapment defense is not based in the Constitution, *Russell*, 411 U.S. at 433, but derives from the perceived intent of Congress not to punish "otherwise innocent" persons who have committed crimes at the government's instigation, *Sorrells*, 287 U.S. at 448. Because Congress is free to make this affirmative defense available on whatever conditions it deems appropriate, or even to eliminate the defense altogether,

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[26] Nor does the Fourth Amendment impose a reasonable suspicion requirement on this practice. The Fourth Amendment does not restrict police activity that does not constitute a "search" or a "seizure." An undercover agent's offer to sell pornographic materials is in no sense either a "search" or a "seizure."

[27] See *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 6-8; *United States* v. *Chin*, 934 F.2d 393 (2d Cir. 1991); *United States* v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc); *United States* v. *Miller*, 891 F.2d 1265, 1269 (7th Cir. 1989); *United States* v. *Driscoll*, 852 F.2d 84, 86-87 (3d Cir. 1988); *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Thoma*, 726 F.2d 1191, 1198-1199 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

Russell, 411 U.S. at 433, the fact that Congress has not imposed a reasonable suspicion requirement for undercover investigations counsels against the Court's imposition of any such requirement.

As a practical matter, of course, it is generally in the interest of efficient law enforcement to conserve scarce resources by predicating undercover investigations of particular individuals on reasonable suspicion. But that will not always be the case. A reasonable suspicion requirement would severely hinder, if not altogether preclude, some commonly used undercover investigations premised on random contact with members of the general public, such as setting up a pawnshop to discover persons who fence stolen goods, and having police officers pose as buyers or sellers of drugs or other contraband, or as prostitutes. A reasonable suspicion requirement would not simply regulate such investigations; it would prevent law enforcement authorities from using these techniques at all. Prohibiting such valuable law enforcement tools is far too high a price for society to pay for protections that are neither constitutionally nor congressionally mandated. That is particularly true in light of the fact that the entrapment defense is available to any person who believes that he was an innocent, law-abiding citizen whom the government caused to break the law.

3. In any event, the agents had reasonable suspicion to conduct an undercover investigation of petitioner based on his mail-order purchase of *Bare Boys I* and *II* and *The Everything Brochure* from a California pornographer nine months before they sent him the letter and survey form from the American Hedonist Society. The *Bare Boys* magazines themselves provide more than the "minimal level of objective justification" that the reasonable suspicion standard imposes, *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). See *Chin*, 934 F.2d at 397. Cf. *Johnson*, 855 F.2d at 304 n.4; *Gantzer*, 810 F.2d at 352. They demonstrate that the agents contacted petitioner because of his own conduct, not in a random effort to see whether a law-abiding citizen could be induced to purchase child pornography if given the opportunity to do so.

* * * * *

If this case had involved bribery or drug distribution, the arguments petitioner has made would have been given short shrift. It would trouble no one if the government initiated an undercover operation directed at a politician who expressed interest in receiving a bribe, even if he did so in a guarded or ambiguous fashion. And there would be little difficulty in dismissing the claim of a seller of controlled substances who was targeted by an undercover drug operation based on indications that he had previously been involved in distributing dangerous drugs, even if his previous involvement was in selling a drug that had not yet been placed on the federal controlled substances list. Moreover, the low-key nature of the contacts with petitioner and the clear signals in the undercover communications that the materials were unlawful would be regarded as the marks of cautious investigative work in the bribery or drug examples.

What troubled the panel in the court of appeals, we submit, is not the nature of the government's conduct, but the subject of the investigation. Both as a matter of policy and as a matter of constitutional law, there has been a vigorous debate for decades about the propriety of regulating the distribution and private possession of sexually oriented

materials. As a policy matter, however, Congress settled that debate for child pornography with the enactment of the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, which outlaws the receipt of materials depicting children engaged in sexually explicit conduct. And as a matter of constitutional law, this Court settled the question two Terms ago by holding that it does not violate the First Amendment for the government to criminalize the private possession of child pornography. See *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990). When those concerns are set to one side, this case becomes a conventional entrapment case involving strong predisposition and fairly conservative investigative techniques. Viewed in light of this Court's decisions on the entrapment defense, the record in this case cannot fairly be read to establish that petitioner was entrapped as a matter of law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1991

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 2252 of Title 18 provides in part:

(a) Any person who—

* * * * *

(2) knowingly receives * * * any visual depiction that has been mailed * * * or which contains materials which have been mailed * * * if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph * * * (2) * * * of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both * * *.

2. Section 2256 of Title 18 provides in part:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-

anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person * * *.

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FOR ARGUMENT

No. 90-1124

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KEITH JACOBSON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

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REPLY BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

In footnote 11 at page 13 of the Respondent's brief, the Solicitor asserts that the Petitioner was offered only two opportunities to buy child pornography and he availed himself of both of them.

The Solicitor is mistaken. Judge Fagg wrote that:

> . . . the postal inspectors only provided Jacobson with opportunities to purchase child pornography and renewed their efforts from time to time as petitioner responded to their solicitations. 916 F.2d 470.

The Solicitor claims the quoted passage may be misleading because it suggests that the agents offered Petitioner opportunities to buy child pornography throughout the twenty eight month period that they were in communication with him.

Judge Fagg is not misleading. He understood quite correctly that Jacobson had been solicited quarterly to

purchase child pornography from February 1985 through at least March of 1987.

Postal inspector Stuart O. Patten sent Jacobson a questionnaire and membership application entitled *The American Hedonist Society* in late January of 1985 (TR166:3; 167:22). This "Society" was a function of the Postal Inspection Service in Madison, Wisconsin (TR166:8). It was a sting operation to try to get people to join it and trade through it (TR166:15). The materials which it offered were child pornograph (TR166:19). Jacobson returned his completed questionnaire to Patten on February 27, 1985 (TR165:15). Patten then enrolled Jacobson in the Society (TR169:24). Enrollment was a matter of preparing adhesive mailing labels with Petitioner's name and address on them and sending them to a postal inspector in Chicago who would mail Jacobson the "Society's" newsletter quarterly (TR170:21). Petitioner's membership was free (TR170:22). Jacobson received the newsletter for as long as the postal inspectors wanted to send them (TR171:21). The purpose of the sting was to identify people that were interested in child pornography (TR326:22), get them to trade through it and apprehend them (TR326:25). This sting was still going on at the time of Jacobson's trial (TR315:3).

The name of the newsletter was "Its a Small World." (Respondent's brief, p.4). The American Hedonist Society was a regional operation (TR326:9). There were a number of such operations around the country which all worked pretty much the same no matter what they were called. *United States v. Musslyn*, 865 F.2d 945 (C.A. 8, 1989) involved "Crusaders for Sexual Freedom" as well as "The American Hedonist Society." *United States v. Chin*, 934 F.2d 393 (C.A. 2, 1991) describes "Candy Love Club" (newsletter with advertisements for a variety of sexually oriented materials). *United States v. Mitchell*, 915 F.2d 521 (C.A. 9, 1990) and *United States v. Esch*, 832 F.2d 531 (C.A. 10, 1987) mention "Love Land," based in Loveland, Colorado (newsletter with classifieds

placed by postal inspectors or members offering child pornography). *United States v. Thoma*, 726 F.2d 1191 (C.A. 7, 1984), was another "Crusader's for Sexual Freedom" case (newsletter "C.S.F. Friends" containing ninety advertisements for a wide variety of sexual tastes). In *United States v. Nelson*, 847 F.2d 285 (C.A. 6, 1988), the sting was called "Ohio Valley Action League" (newsletter with ads for child pornography).

In *United States v. Mitchell*, *supra*, the Ninth Circuit quoted "Love Land's" membership application-questionnaire as follows:

> a society for those who adhere to the doctrine that pleasure and happiness is the sole god in life. We believe that we have the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without the restrictions placed on us by our outdated puritan morality.

This is word for word the "American Hedonist Society" membership application-questionnaire.

An article in Cardozo Arts and the Entertainment Law Journal, "*The Child Porn Myth*," Volume 7, No. 2, page 295, 324 (1989) by Lawrence A. Stanley, catalogs each of these regional stings including "Its a Small World: The Newsletter of the American Hedonist Society" which the author says is operated by Inspector Calvin Comfort. The author adds to the stings already mentioned: "Computer Link Coop," "New Age: The Truth Through Education," "Ponce De Leon, S.A. Fountain of Youth Inner Circle Club," "The Little Light" and the "American Sensuality Society." The author states:

> Government newsletters also encourage suspects to place advertisements soliciting or offering to sell or buy child pornography. All advertisements other than the targeted suspect's are placed by police officers so any attempt by the suspect to exchange, sell or buy pornography results in arrest.

Judge Heaney's dissent states at 916 F.2d at 475:

> The Postal Service then "enrolled" Jacobson in the American Hedonist Society and began sending him the

> Society's newsletters, which advertised sexually explicit materials for sale. Jacobson never ordered any of the advertised materials.

Judge Heaney also says that, "the government, in the guise of five separate fictitious enterprises and one fictitious individual, contacted Jacobson through the mail eleven more times (the first of the twelve being the "American Hedonist Society's" membership application-questionnaire) before he finally ordered *Boys Who Love Boys*. 916 F.2d 472.

Judge Lay says:

> Over a period of two and one half years, the government, using as a subterfuge various fictitutious organizations, repeatedly solicited Jacobson through the mail to purchase illegal pornography. 916 F.2d 471.

How did Judge Fagg, Judge Heaney and Judge Lay all overlook the fact which the Solicitor now claims he has discovered, that the Government only offered Jacobson child pornography twice? The answer is that the judges are right and the Solicitor has erred.

Judge Heaney mentions "eleven more" contacts. The contacts include the "Hedonist Society" newsletters.[1] The six stings Judge Heaney counts are "American Hedonist Society," "Heartland Institute for a New Tomorrow," "Midlands Data Research," the "Carl Long" correspondence, "Operation Borderline," and "Project Looking Glass."

Calvin Comfort knew that the "American Hedonist Society" newsletter contained advertisements for child pornography, and that Jacobson had never responded to a solicitation in the newsletter when Comfort sent his

[1] Jacobson received at least eight newsletters before March 1987. Since no newsletters were found when Jacobson's home was searched, defendant has been unable to make an exact count, but if the newsletters started coming in the second quarter of 1985, Jacobson received three in 1985, four in 1986 and at least one in 1987 prior to the Operation Borderline contact. The three Carl Long letters make eleven.

name to the Operation Borderline and Project Looking Glass.

Furthermore, Comfort knew that Jacobson had stated in the American Hedonist Society questionnaire that he was *opposed to* pedophilia (TR479:2). Comfort testified that the purpose of the "Carl Long" correspondence was to ascertain if Jacobson was involved in child pornography, see if he was inclined to send it through the mail, and invite him to send it in the mail (TR343:13). Comfort knew that Jacobson had responded to the "Heartland Institute" questionnaire that:[2]

> Not only sexual expression but freedom of press is under attack. We must be ever vigilant to counter attack wing fundamentals who are determined to curtail our freedoms (TR479:25).

The Solicitor's brief minimizes the purpose of the "Carl Long" correspondence. These letters were intended to persuade Jacobson to send Comfort child pornography and the tactic works beautifully if the subject is predisposed, as in *United States v. Fletcher*, 672 F. Supp. 1145 (N.D., Ia. 1987), *United States v. Zangger*, 848 F.2d 923 (1988). Both in his letter dated September 19, 1986 (E13, T375, 376) and his letter dated October 14, 1986 (E15, T375, 376) "Long" asks Jacobson to "send me your fantasy."

In his first letter to Comfort as "Long" on September 18, 1986 (E12, 375, 376) Jacobson said, "I think I should be able to read or view what I want in the privacy of my

[2] The Solicitor makes much of the Petitioner's letter to Heartland stating that Heartland had not sent him a questionnaire. The letter was correct, however, because "Midlands Data Research" sent it (TR338:9). The Solicitor argues that Jacobson didn't get a questionnaire from Midlands. However, he had a blank questionnaire, E103 (TR339:1). Comfort testified that Jacobson got two questionnaires at different times (TR340:1); that one of the two times the questionnaire was sent, Jacobson did not complete it (TR340:4); and that would have been the first time (TR340:7). The Solicitor quotes extensively from Exhibit 102 (E102, 368, 369) but Jacobson never sent this letter to Comfort (TR368:3) which tends to show that Jacobson changed his mind about receiving other surveys.

own home." Comfort as "Long" responded on September 19, 1986 (E13, 375, 376), "I agree with you about privacy. I am real discrete but still our conservative society wants to pry into private lives." The postal inspector's emphasis on discretion recurs in Jacobson's note to "Far Eastern Trading Co." (E3, 214, 214), "I want to be discrete to protect you and me."

On September 29, 1986 Jacobson also wrote "Long" that, "I like good looking young guys in their late teens and early twenties doing their thing together." (E14, 375, 376).

Therefore, Comfort had explored Jacobson's interest in "teenage sexuality" expressed to "Midlands Data Research" (E8, 356:356) May 31, 1986 and Comfort knew through the "Carl Long" correspondence that Jacobson was not involved in child pornography and was not inclined to use the mails to either send or receive it.

Nevertheless, Comfort sent Jacobson's name to "Operation Borderline" and "Project Glass" even though two years of testing and soliciting had failed to disclose that Jacobson had any desire to receive sexually explicit pictures of children through the mails. The undisputed evidence in the possession of postal authorities at the moment that Jacobson was included in "Borderline" and "Looking Glass" was that he was not trafficking in child pornography and that his sexual preference was homosexual but not pedophilic. This evidence had been obtained *after* postal authorities first contacted Jacobson.

The Government's brief also asserts that Judge Strom received the *Bare Boys* magazines in evidence as soon as he saw them. The judge did say, ". . . I, of course have not seen the magazines" (TR236:14). This remark is a little odd because the court had certainly seen the magazines by that time.

At TR4:7, the record shows that the judge asked the Assistant District Attorney if he intended "to get into the 404 materials this afternoon" (TR4:7). Upon being

assured that the Government would, the court asked to see "all of that so that I will be better prepared to consider any objections . . ." (TR4:9). He scheduled a meeting in chambers with counsel to review it (TR4:16).

When Judge Strom says at TR236:5 that he was bothered "the other day" because those magazines (*Bare Boys*) do not suggest illicit sexual activity, he is referring by "the other day" to the conference in his chambers.

ARGUMENT

The amicus briefs and the Solicitor's brief argue at length that the problem of child pornography is so serious and its consumers so secretive and circumspect that the tactics used against petitioner are justified.

This is just arguing that the ends justify the means. In fact, it is arguing that the ends are so important that the government may exploit children by purveying child pornography to prevent the exploitation of children.

Many of the cases cited by amicus and the Solicitor prove that real criminals can be apprehended, prosecuted and convicted without creating "naive first offenders" who are subjected to ignominy, disgrace and ruin by overzealous pursuit of a desirable objective.[3]

I. PROOF OF PREDISPOSITION MAY BE MADE BY EVIDENCE OF DEFENDANT'S PAST OFFENSES, PLANNING AND PREPARATION, EVEN READY COMPLAISANCE, BUT MERE READINESS ALONE IS NOT ENOUGH.

Both the Solicitor and Amicus Bliley argue that Jacobson's "ready complaisance" proves predisposition. The "ready complaisance" phrase appears in *United States*

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[3] "Project Looking Glass" produced four suicides including one in Nebraska. Stanley, *The Child Porn Myth*, 7 Cardozo Arts and Entertainment Journal 2 (1989) p. 325 and note 149.

v. Sherman, 200 F.2d 880 (C.A.2, 1952) in which Judge Learned Hand's opinion reversed Sherman's first conviction for the same offense which this Court later found he was entrapped to commit as a matter of law. The entire quotation is:

> The proof of this (predisposition) may be by evidence of his past offenses, of his preparation even of his 'ready complaisance.' 200 F.2d 882, 240 F.2d 951.

The words "ready complaisance" were adopted by Judge Hand from a prior opinion he had written in *United States v. Becker*, 62 F.2d 1007, 1008 (C.A. 1933) where he said:

> The only excuses (for inducement) that courts have suggested so far as we can find are these: an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes, his willingness to do so as evidenced by his ready complaisance. . . . We do not wish to commit ourselves to the doctrine that mere readiness is enough. . . . The whole (entrapment) doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent though ductile persons into lapses which they might resist. Such emotion is out of place if they are already embarked in conduct morally indistinguishable, and of the same kind.

The Government points to its Far Eastern Trading Co. contact letter and claims that its language shows that petitioner could not reasonably believe that it was not against the law to receive *Boys Who Love Boys*. At least one circuit court has viewed this same contact letter as offering "a safe and legal way to receive child pornography in the mail." *United States v. Chin*, supra.

The Solicitor ignores the overall impact of repeated solicitations upon a defendant battling with his desires. *The Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III-R), American Psychiatric Association, Washington, D.C., 1987 states at page

285 that in certain males, latent pedophilic sexual desires may be aroused in middle age. The postal service is aware of this phenomenon. In *United States v. Goodwin*, 854 F.2d 33, 35 (C.A. 4 1988), the Court notes that postal inspector's test correspondence with the defendant disclosed "that Goodwin was a beginner whose latent desires were just emerging."

Judge Clary observed the danger of over persistent solicitation in *United States v. Kros*, 296 F.Supp. 972 (E.D. Penn., 1969):

> By permitting such publications as "Swingers Life" to be sent through the mails, the Government, in a sense, lends an aura of legitimacy to all of the bizarre sexual activities which are explicitly suggested by each of the hundreds of personal ads which make up the magazine. Although this is not in itself enough to sustain the defense of entrapment, particularly where, as contended by the Government here, its tolerance of the magazine is constitutionally required, when the Government, itself goes further and runs an ad which is calculated to stimulate the prurient interest of persons such as defendant, it cannot, with good grace complain of the natural and probable consequences of its own act.

Of course, "It's A Small World" and "Far Eastern Trading Company" were publications which the Government was not constitutionally required to tolerate. These were vehicles created by the Government itself to sell child pornography.

What the postal inspectors had after two and a half years of quarterly newsletters, annual sexual surveys and solicitation by various "front" organizations here was not "ready complaisance." It was a naive first offender logically concluding that receiving *Boys Who Love Boys* could not be against the law or else the opportunities to do so would not be so frequently and persistently available.

II. PREDISPOSITION FOCUSES ON THE INTENT AND DISPOSITION OF THE DEFENDANT TO COMMIT THE CRIME CHARGED BEFORE HE IS CONTACTED BY GOVERNMENT AGENTS.

The Solicitor advances the notion that buying something which evokes a sexual response evidences a predisposition to commit the crime of receiving illegal material through the mail.[4] Next he argues that the lawful receipt of *Bare Boys I and II* proves that Jacobson was disposed to commit the crime of receiving child pornography through the mail relying on *United States v. Gantzer*, 810 F.2d 349 (C.A.2, 1982); *Osborn v. United States*, 385 U.S. 323, 17 L.Ed.2d 394, 87 S.Ct. 429 (1966), n.11; *United States v. Andrews*, 765 F.2d 1491 (C.A. 11, 1985); *United States v. Johnson*, 855 F.2d 299 (C.A. 6, 1988).

It is very important to note that the advertisement from which Jacobson purchased *Bare Boys* was not offered into evidence by the Government and that Jacobson testified he did not know he would receive magazines depicting such young subjects (TR449:13, 14). Surely, the subjects in *Bare Boys* are naked, but depictions of nudity, without more, constitute protected expression. *Osborne v. Ohio*, 495 U.S. ——, 109 L.Ed.2d 98, 111, 110 S.Ct. 1691 (1990).

The uncontradicted evidence in this case is that Jacobson was not seeking child pornography before he was

[4] The Solicitor concludes that *Bare Boys I and II* are lascivious because they contain a graphic focus on genitals coupled with the production of a sexual response in some persons. The evidence is that the magazines are not lascivious because they were not specifically designed to be erotic (TR397:13). The Government tried to overcome this testimony by inferring in the cross examination of Dr. Dienspier that the magazines may have provoked a sexual response in Jacobson (TR402:4, 7). Down this road lies the conclusion that nudity becomes pornography when it "turns someone on." Thus, a picture of a naked sixteen year old male in the hands of a normal male heterosexual, is not child pornography, but it is child pornography in the hands of Keith Jacobson. If the naked figure is a sixteen year old girl, the reverse must be true.

first contacted by postal inspectors. The Carl Long correspondence confirms that Jacobson's taste was for "guys in their late teens and early twenties doing their thing together." (E13).

Congress passed P.L.98-292, May 21, 1984, making it a crime to receive a visual depiction involving the use of a minor engaging in sexually explicit conduct in the mail. As amicus note, the purpose of the statute was to target "the child pornography underground" (Brief of National Center for Missing and Exploited Children, et al., p. 4). It was to provide postal inspectors with a tool to prosecute and convict the consumer of child pornography.

The sheer volume of cases cited by the Solicitor conclusively demonstrates the direction taken by the postal inspectors. The Government has become the number one commercial purveyor of child pornography in the United States.[5]

With that approach, however, has come the danger that overzealous officers will tempt those who are not members of the "child pornography underground." Naivete, loneliness and plain stupidity make individuals vulnerable to the commission of a crime which, when this case began with a raid on Electric Moon in 1984, and yet to be created.

In the cases relied upon by the Government, the intent to commit the crime charged was proved by some evidence predating contact by Government agents with the defendant. Petitioner insisted that the jury be instructed that a violation of 18 U.S.C. 2252(2) required a specific intent to violate the law and that entrapment required proof of willingness to commit a crime.[6] The Petitioner never persuaded the trial court to give these instructions so the question of Petitioner's intent to commit the crime

[5] Government created publications are the only publications in the United States today which advertise, sell, offer to purchase or exchange child pornograph. Stanley, *The Child Porn Myth*, 7 Cardozo Arts and Entertainment Law Journal 2, 1989 p. 324.

[6] Appellant's brief before the Eighth Circuit, page 25.

charged is unresolved. The Solicitor strains mightily to establish by argument and innuendo that Jacobson could not have been acting innocently, but he lacks the force of a jury verdict to sustain him.

The absence of such a finding troubled Chief Judge Lay who said in his dissent:

> Based on Jacobson's prior history, it is not clear that he would knowingly and voluntarily violate the law by purchasing obscene materials. The evidence fails to show Jacobson was predisposed to commit the crime of which he was ultimately convicted. (916 F.2d 471).

The Solicitor advances the proposition that predisposition can be proved by evidence of conduct which is not criminal. Petitioner concedes that evidence such as planning and preparation is probative. *United States v. Becker, supra.*

The cases cited by the Solicitor, however, do not appear to extend beyond this class of evidence. In *United States v. Gantzer, supra,* the predisposition evidence consisted of letters from Gantzer requesting catalogs advertising pornographic materials, letters to Gantzer discussing the availability of pornography and a catalog advertising pornographic films all predating his contact with postal inspectors. The Second Circuit held the evidence properly admitted because it permitted the inference that:

> far from being seduced by the Government, Gantzer's general purpose of obtaining and exchanging pornography, particularly child pornography was formed prior to Inspector Smith's invitation.

No such evidence exists in this case.

Johnson is not even remotely in point. He possessed a collection of child pornography consisting of one hundred magazines, fifty eight books and booklets, thirteen reels of film and numerous drawings all in the original postmarked envelopes disclosing that they had been received

from California, Denmark, Sweden and the Netherlands. He answered an ad placed by postal inspectors in a national magazine. The ad did not expressly say the inspectors were selling child pornography. Johnson asked for it. Johnson argued that the Government had failed to prove predisposition. The Sixth Circuit made short work of his contention.

Footnote eleven cited by the Solicitor in *Osborn v. United States, supra,* just says that when the defense of entrapment is raised, a searching inquiry into defendant's own conduct is appropriate, citing *Sorrells v. United States,* 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249 (1932). Mr. Justice Roberts, concurring in *Sorrells* said:

> It has been generally held, where the defendant has proved an entrapment, it is permissible to show in rebuttal that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense. This procedure is approved by the (majority) opinion of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted. 77 L.E.426.

But, as *Sherman v. United States,* 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958) plainly holds, not even convictions prevent a finding of entrapment as a matter of law, let alone the lawful receipt of two magazines which only innuendo can now elevate to the status of "lascivious."

In *United States v. Andrews, supra,* the defendant proposed to buy contraband food stamps from an undercover policeman. The undercover officer did not broach the subject, Andrews did.

None of the cases advanced by Respondent are like Jacobson.

III. THE FACTS OF THE ENTRAPMENT CASES CITED BY THE GOVERNMENT ARE NOT COMPARABLE TO THE FACTS SHOWN BY THE RECORD IN THIS CASE. THE DEFENDANTS WERE ALL PROVEN TO BE SEEKING CHILD PORNOGRAPHY BEFORE THEY WERE CONTACTED BY POSTAL INSPECTORS.

The Solicitor fortifies his argument with a footnote containing fourteen circuit court cases which the Solicitor asserts are "like this one." Of the fourteen defendants, eight did not raise the entrapment defense in the circuit court: *United States v. Chin, supra*; *United States v. Mitchell, supra*; *United States v. Dawson*, 869 F.2d 271 (C.A.7, 1990); *United States v. Musslyn, supra*; *United States v. Goodwin, supra*; *United States v. Donnhoffer*, 859 F.2d 1195 (C.A. 4, 1988); *United States v. Driscoll*, 852 F.2d 84 (C.A.3, 1988); *United States v. Esch, supra.*

As for the rest, with one exception, none comes near making even a close case of entrapment.

In *United States v. Moore*, 916 F.2d 1131 (C.A.6, 1990) defendant admitted he knew it was against the law to receive sexually explicit photographs depicting minors through the mail but he did it anyway. In *United States v. Johnson, supra, Johnson* was "clearly predisposed."

In *United States v. Nelson, supra*, defendant wrote a letter to a convicted child pornographer seeking photos of a "mature bi-lady and a young one, especially if its her daughter." The Government found the letter and enrolled Nelson in the "Ohio Valley Action League." The postal inspectors offered him a free ad in the Leagues "newsletter." When neither of these ploys succeeded, postal authorities mailed Nelson the trusty contact letter "from a fictitious Virgin Islands corporation." Nelson asked for a tape of "very young people" and a catalog. When he received the catalog, he ordered a video tape of minor females engaged in sexual acts. The Third Circuit noted that entrapment as a matter of law was a difficult question but resolved it in favor of the conviction because "at

the very outset, Nelson's letter seized in the December 1984 search evidences a predisposition to violate section (18 U.S.C.) 2252."

Such a letter is not in this record.

The Solicitor also cites *United States v. Rubio*, 834 F.2d 442 (C.A. 5, 1987). Customs agents had intercepted three magazines depicting sexually explicit behavior by minors addressed to Rubio before postal inspectors began their temptation of him and while they were still trying to provoke Rubio into buying sexually explicit photos of minors from them, another order by Rubio of foreign child pornography was intercepted by Customs. The Fifth Circuit called the government's conduct unquestionably offensive but Rubio obviously predisposed.

The Solicitor General once again cites *United States v. Thoma, supra*, which has now appeared in every Government brief since Jacobson's trial. Thoma had a prior conviction for distributing pornography. Postal Inspector John Ruberti sent Thoma a free membership in "Crusaders for Sexual Freedom." Thoma then placed an ad in "Crusaders" newsletter seeking a photo session with "young preteen and teenage boys and girls." Ultimately, Thoma answered twenty eight ads and wrote Ruberti, posing as the secretary of "Crusaders" asking if an answer to an ad placed by the police would constitute entrapment. Thoma also sold, and mailed Ruberti five hundred sexually explicit photos of teens and preteens. When Thoma was arrested, he confessed that he had only gotten back into the pornography business because money was tight.

It is hard to see the parallel between these defendants and Jacobson. Stuart Patten said the purpose of the Hedonist Society was to get people to trade (child pornography) through it. (TR166:15-16). Jacobson never traded through the Hedonist Society. Jacobson had no record of criminal activity and it was not the commission of a crime which brought him to the postal authorities' attention. These other defendants had engaged in prior criminal conduct clearly knowing that was what they were doing.

IV. REQUIRING THE GOVERNMENT TO HAVE A REASONABLE INDICATION THAT A TARGET IS ENGAGING, HAS ENGAGED OR IS LIKELY TO ENGAGE IN CRIMINAL ACTIVITY DOES NOT UNDULY BURDEN UNDERCOVER OPERATIONS.

At page 41 of the Government's brief, the Solicitor argues that a reasonable suspicion requirement "would severely hinder . . . commonly used undercover investigations premised on random contact with the general public."

Any rules fashioned from statutory construction, Congressional enactment or constitutional interpretation to protect the citizen from Government overreaching hinders law enforcement. Nevertheless, rules there are, because rules are needed. The Ninth Circuit has even pleaded for guidance in this area. In *United States v. Mitchell*, *supra*, a "Love Land" sting, footnote 8, 915 F.2d 521 states:

> The investigation in the case at bar illustrates why there is a need for some due process [7] limits on undercover operations. Thousands of persons answered the Love Land questionnaire yet only 1400 gave answers that triggered further solicitation. The thousands who did not give such answers nonetheless unknowingly disclosed their sexual attitudes and proclivities to the Government and were deceptively led to tell the government such intensely private information as the age when they had their first sexual experience. That the government, in persuading persons to answer the questionnaire, cynically invoked the rhetoric of the First Amendment is particularly offensive.

However, another good answer to the Solicitor's argument is that each of the undercover operations described in his brief is a subparagraph (b) sting:

> (b) the opportunity for illegal activity has been structured so that there is reason for believing that

[7] "Limits" is the operative word. Petitioner should not be understood to argue that the Fifth Amendment is the only source available.

> persons drawn to the opportunity or brought to it, are predisposed to engage in the contemplated illegal activity (Petitioner's brief, p.20; Senate Report No. 97-682).

This paragraph of the Senate Select Committee final report also distinguishes the Abscam cases mentioned by the Solicitor. The Government Amscam informant, testified in one of those cases, *United States v. Kelly*, 707 F.2d 1460, 1462 (D.C. Cir., 1983):

> We had a big honeypot and all the flies came to the honey.

In contrast to Jacobson, who was bombarded for at least 28 months with sexual surveys, newsletters, correspondence from fictitious friends and First Amendment rhetoric, the Abscam defendants caught themselves by dipping their fingers into the "honeypot."

Requiring the Government to have a reasonable indication that a subject is engaging, has engaged or is likely to engage in illegal conduct before Government agents begin a campaign of inducement to criminal behavior is no more than restating Mr. Justice Roberts "reasonable cause to believe" phrase from *Sorrells*. 77 L.Ed. 426. If this is so burdensome, it is a wonder that the Attorney General adopted it in the first place.

V. WHEN THE GOVERNMENT CREATES A MARKET FOR ILLEGAL ARTICLES BY EXPLOITING THE VULNERABILITY OF OTHERWISE INNOCENT CITIZENS, THE GOVERNMENT HAS COMMITTED ENTRAPMENT AS A MATTER OF LAW.

Reading the Circuit Court opinions cited by the Solicitor General "suggests a certain semantic disarray." *United States v. Evans*, 924 F.2d 714, 717 (C.A.7, 1991).

The opinions of the Supreme Court, however, are in order. While Judge Fagg's en banc opinion in this case comingles Government undercover operations with Fifth Amendment Due Process principles, *Sorrells v. United*

States, supra, says entrapment is not a constitutional defense, but exists because it was not the intention of Congress "in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them." 77 L.Ed.2d at 420.

While the Circuit Courts struggle to comprehend "inducement" and even claim the "consideration of inducement as a separate issue serves no useful purpose and we believe it to be a mistake. . ." *Kadis v. United States*, 373 F.2d 370, 373 (C.A. 1, 1967), Sorrells speaks plainly of an "alleged offense which is the product of the creative activity of (Government) officials," 77 L.Ed. 422, approves the language of Judge Sanborn in *Butts v. United States*, 273 F.38, 18 A.L.R. 143 (C.A.8, 1921) criticizing Government officials who "inspired, incited, persuaded and lured," and condemns official conduct:

> . . . when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

While the Eighth Circuit's majority concludes that this is not a case "in which the Government was an manufacturer rather than a detector of crime," 916 F.2d 467, 470, *Sherman v. United States, supra*, warns against "tempting innocent persons into violations," 2 L.Ed.2d 851; urges that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," 2 L.Ed.2d 851; and reprehends "play(ing) on the weakness of an innocent party and beguiling him into committing crimes which he otherwise would not have attempted." 2 L.Ed.2d 858.

The Government's argument in *Sherman* was identical to the Solicitor's principal contention in this case, Sherman's "ready complaisance." 2 L.Ed.2d 852. But Sherman, like Jacobson submitted only after repeated solicitation, and made more narcotics sales than the one for which he was prosecuted, just as Jacobson made one other purchase besides the one for which he is prosecuted. The Court said in *Sherman* that such sales "were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement". (2 L.Ed.2d 852).

Three times since *Sherman* the Supreme Court has had the opportunity to re-examine *Sorrells* and *Sherman* but each time left them undisturbed. In *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 98 S.Ct. 1637 (1973), the court said, "we are content to leave the matter where it was left in *Sherman*. . ." 36 L.Ed.2d 375. In *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the court briefly reviewed *Sorrells, Sherman* and *Russell* and concluded:

> If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce it commission' . . . *Sorrells, supra*, at 442, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249, the defendant is protected by the defense of entrapment. 48 L.Ed.2d 119.

In *Mathews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 108 S.Ct. 883 (1988) the Court again adhered to the view that the defense of entrapment has two related elements, inducement and "a lack of predisposition on the part of the defendant to engage in the criminal conduct." The Court repeated that predisposition:

> focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. 99 L.Ed.2d 61.

Thus, the Court has consistently adhered to the proposition that there is a distinction between being predisposed and merely vulnerable.

Sherman was a recovering drug addict. He was vulnerable but when approached by Kalchinian he was resisting his demons. He had done nothing wrong.

Jacobson is a stronger case than Sherman because Jacobson had no criminal history when approached by Patten while Sherman had two prior convictions, a nine year old sales conviction and a five year old possession conviction. Jacobson had received two nudist magazines in the mail which the Government concedes was not a crime. He had no pedophilic collection in his posesssion when his home was searched. Sherman, on the other hand, was a known drug addict with a previous history of unlawful activity undertaken to gratify his addiction.

Jacobson is a war veteran living a small rural community. He produced evidence of good citizenship, regular, responsible employment and an excellent reputation. He is strikingly similar in many respects to C.V. Sorrells except Jacobson was solicited by mail instead of face to face.

Both Sherman and Sorrells were arrested for acts which both knew were crimes when committed. That factor does not appear in this case. The jury did not determine that Jacobson knowingly ordered sexually explicit photos of minors knowing that it was a crime to do so. Jacobson denied he knew it was a crime.

Lonely old men who may harbor "'private fantasies" are not within the statute's (18 N.S.C. 2252(a)) ambit. *United States v. Wiegand*, 812 F.2d 1239, 1245 (C.A.9, 1987). Although the Government has a duty to protect children by suppressing the market for child pornography, the Government cannot first create the market by tempting the innocent, but vulnerable and then justify prosecution by claiming it is merely suppressing the market.

Keith Jacobson should have been left alone.

CONCLUSION

This case should be reversed and remanded with directions to dismiss.

Respectfully submitted,

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(5)

No. 90-1124

MOTION FILED
JUN 18 1991

In The
Supreme Court of the United States

October Term, 1990

KEITH JACOBSON,
Petitioner,

— against —

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS,
FOR THE EIGHTH CIRCUIT

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90-1124

In The
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AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC., AND THE
NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF THE RESPONDENT.

MOTION OF AMICI
CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., et al., and move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's

programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

2. *Desirability of an Amici Curiae Brief. Amici* are professional associations representing the interests of law enforcement agencies at the national and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of initiating and conducting investigations within the bounds of the law, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA, and NSA, are national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding law enforcement conduct in the law of initiating investigations. Although Respondent is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* have reviewed the Brief for the United States in Opposition to the Petition for Certiorari and have conferred with counsel for Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel have requested consent of the parties. The consent of the Respondent has been received and filed with the Clerk of this Court. This Motion is necessary because the Petitioner has declined to grant consent to *amici curiae*.

For these reasons, *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

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ARGUMENT

I.

THE PETITIONER HAS NOT BEEN ENTRAPPED AS A MATTER OF LAW.

The court below, *U.S. v. Jacobson,* 916 F.2d 467 (8th Cir. 1990) (en banc), ruled that in the absence of government conduct so outrageous as to violate due process principles, there was no constitutional bar to the institution of a "sting" operation targeting a person who was not reasonably suspected of being predisposed to commit a crime. It held that a child pornography sting operation in which the government, acting without reasonable suspicion that the Petitioner, hereinafter referred to as the defendant, was predisposed to commit the crime of receiving child pornography through the mails, targeted the defendant, whose name was obtained from a pornography bookstore's list, mailed him sexual-attitude surveys, letters, and catalogs, and then fulfilled his order for sexually explicit materials involving juveniles, did not amount to outrageous conduct in violation of the Fifth Amendment's Due Process Clause and that the defendant was not entrapped as matter of law.

In fact, and in law, no constitutionally protected right of the defendant was violated in this case. He had no right to possess child pornography, and he had no right to be free

from investigation. He could prevail only if he could show that the government's conduct in sending him a few letters, surveys, and catalogs was so outrageous as to offend due process. Yet, as the court below observed, those actions were far less pressing inducements than those that typically occur between two persons in face-to-face meetings.

The en banc decision of the court below is in accord with the unanimous view of other circuits that the government need not have reasonable suspicion of criminal activity before beginning an undercover investigation. Those courts recognize that as long as the conduct of the investigation does not violate due process, the absence of reasonable suspicion at the outset of the investigation does not bar the conviction of someone who commits a crime. *United States v. Driscoll,* 852 F.2d 84 (1988); *United States v. Jenrette,* 744 F.2d 817, (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States v. Gamble,* 737 F.2d 853 (10th Cir. 1984); *United States v. Jannotti,* 673 F.2d 578 (3rd Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States v. Myers,* 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980). Since the investigation in this case did not violate the defendant's due process rights, he cannot escape liability on the ground that the government might not have had reasonable suspicion of his criminal activity when it commenced its investigation.

II.

A RULE THAT LAW ENFORCEMENT AUTHORITIES MUST HAVE PARTICULARIZED SUSPICION BEFORE INITIATING INVESTIGATIVE ACTIVITIES WOULD UNDULY HAMPER, IF NOT CURTAIL, MANY LAW ENFORCEMENT INITIATIVES.

Amici would like to point out to this Court the deleterious practical impact of a rule requiring reasonable suspicion

before investigative activity commences, namely, that virtually all sting-type operations would be precluded by such an approach. Our special interest as law enforcement administrators and prosecutors is the avoidance of so restrictive a rule. It would basically shut down a major portion of present legitimate law enforcement activity.

Law enforcement agencies at all levels of government frequently have information that a particular form of illegal activity—such as narcotics trafficking, stolen automobiles, fencing of stolen property—exists, but with no firm suspects. A particular local agency may, for example, have a myriad of stolen car reports but no precise leads as to suspects. If it were necessary to have suspicion focused upon a particular individual before launching an investigation, such as a sting operation utilizing an automobile resale activity set up by the police to attract those with stolen cars to sell, law enforcement agencies could do little, if anything, to cope with criminal activity. Even if the police had information concerning a particular suspect but that information did not yet rise to the level of reasonable suspicion under *Terry v. Ohio,* 392 U.S. 1 (1968), they would be powerless to act under the rule advocated by the defendant in this case.

While the instant case involved receiving pornography through the mails, probably the most useful aspects of sting operations have pertained to property offenses. According to the FBI Uniform Crime Reports, *Crime in the United States,* 1989, larceny-theft offenses accounted for 55% of the national Crime Index total, with theft of motor vehicle parts, accessories, and contents making up 38% of all reported larcenies. Yet, only 18% of such property crimes were cleared in 1989.

In order to cope with the lack of suspects in many cases, the police resort to sting operations or baited vehicle operations, such as that recently described in the article,

"Police Practices: Baited Vehicle Detail," May 1991 *FBI Law Enforcement Bulletin,* p. 24. This technique, employed by local authorities in Waycross, Georgia, involved "baiting" a vehicle with attractive items of personal property in plain view and within easy access of passersby, and leaving the vehicle "unattended" along a roadside (but with police nearby watching the vehicle while remaining out of sight). When passersby reached into the vehicle to steal an item such as a portable radio or TV, they were arrested. Operations of this type are undertaken without pre-existing reasonable suspicion focused upon a particular suspect. They are useful investigative techniques that would be threatened by a broad rule requiring the existence of reasonable suspicion prior to law enforcement investigative activity.

Amici respectfully submit that in fashioning a rule in the instant case the Court should keep in mind the urgent necessity of not adversely affecting sting and related operations. Such operations are not only necessary but are often remarkably effective. In the FBI article cited, it was noted that in 1989 62.5% of the baited vehicle operations employed by the subject agency resulted in arrests, and 100% of the cases involved adult offenders who were successfully prosecuted. Sting operations have proven to be successful and their deterrent effect upon those who are predisposed to commit similar crimes cannot be doubted. Thus, such techniques not only take offenders off the street but are preventative as well.

CONCLUSION

ACCORDINGLY, WE RESPECTFULLY REQUEST THIS COURT TO AFFIRM THE DECISION OF THE COURT BELOW ON THE BASIS OF LAW AND EQUITY BY HOLDING THAT THE GOVERNMENT DID NOT VIOLATE DEFENDANT'S RIGHTS IN THIS CASE, AND, MORE BROADLY, THAT LAW ENFORCEMENT OFFICERS DO NOT NEED REASONABLE SUSPICION BEFORE LAUNCHING AN INVESTIGATIVE ACTIVITY OF THIS OR RELATED TYPES.

Respectfully submitted,

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No. 90-1124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEBRASKA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statute

Other Authorities

INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The Nebraska Civil Liberties Union is one of its statewide affiliates. This case raises fundamental questions about the constitutional limits on the state's power to investigate its citizens. Its proper resolution, therefore, is a matter of direct organizational concern to the ACLU.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal defense law, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is to promote the proper administration of criminal justice. Consequently, the NACDL is concerned with protecting individual rights and with improving criminal law, its practices and procedures. In furtherance of that organizational objective, NACDL strives to ensure that the government's conduct of undercover "sting" operations does not employ methods that violate the Due Process Clause, or that constitute entrapment as a matter of law.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Keith Jacobson is a 57 year old resident of Newman Grove, Nebraska, who lives on a farm, supports his elderly parents, was a war hero, and had prior to this case an unblemished record save for a driving offense over thirty years ago. He was targeted by the government for an undercover "sting" operation because his name was discovered on a bookstore's mailing list as having purchased two nudist magazines -- the receipt of which did not violate any law -- and a brochure listing stores selling sexually explicit material. Although the government had no information that Jacobson had ever ordered or advertised for any child pornography, had ever purchased child pornography or produced child pornography, or was likely to engage in the receipt or distribution of child pornography, the government launched a two and one-half year operation involving twelve solicitations from five separate government-created entities in order to entice Jacobson to purchase a magazine depicting child pornography, which he eventually did, and for which he was prosecuted and convicted.

A panel of the Eighth Circuit reversed his conviction with one judge dissenting, holding that Jacobson was entrapped as a matter of law. *United States v. Jacobson*, 893 F.2d 999 (8th Cir. 1990). The majority concluded that before launching an undercover "sting" operation aimed at a specific individual, the government must have a reasonable suspicion based on articulable facts that the target had committed a similar crime in the past or was likely to commit such a crime in the future. Otherwise, "government agents [could] target entire groups of people without specific justification, hoping to uncover some individual who is predisposed to commit crime if given enough opportunities to do so." *Id.* at 1001. Thus, the panel concluded, any evidence that Jacobson was predisposed to engage in criminal activity was tainted by the illegal targeting.

Upon rehearing *en banc*, the court of appeals vacated the panel's decision and affirmed the conviction. *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990). The court, with Chief Judge Lay and Judge Heaney dissenting, held that Jacobson had no constitutional right to be free of investigation, and that there is no requirement that the government have a reasonable suspicion based on articulable facts before targeting an individual with an undercover "sting" operation. The court further held that the government merely presented Jacobson with opportunities to purchase child pornography, and the question of his predisposition was properly left to the jury.

This Court granted *certiorari*, limited to the question of whether a defendant has been entrapped as a matter of law when the government, having failed in several attempts to entice him to engage in illegal activity over a two year period, and in violation of their own guidelines for the conduct of undercover operations, finally induces the defendant to receive child pornography through the mails.

SUMMARY OF ARGUMENT

Undercover "sting" operations can be a useful law enforcement tool. They are also easily prone to abuse. It is important, therefore, for this Court to hold that such operations cannot be commenced absent some indication that the targeted individual is likely to engage in illegal activity. This minimal restraint is implicit in the notion of fundamental fairness embodied in the Due Process Clause. It also flows directly from what Justice Brandeis described as the "right to be let alone."

The government argues that its investigatory powers are unrestricted by any requirement of particularized suspicion. However, the FBI's own internal guidelines carefully provide that undercover operations may not be undertaken absent a "reasonable indication" that the tar-

geted individual has engaged, is engaged, or is likely to engage in similar illegal activity. Alternatively, the guidelines state that the undercover operation must be "structured" to insure that it will only attract persons otherwise predisposed to engage in the illegal activity under investigation.

In making this determination, the government may not rely on constitutionally protected activity to launch an undercover operation. Thus, conduct that is protected by the First Amendment, such as the right to read, to observe, and to fantasize, may not be used as the basis for interfering with an individual's liberty and autonomy.

The record in this case leaves little doubt that petitioner was entrapped as a matter of law into purchasing child pornography. Absent any basis to suspect that he was likely to engage in illegal activity, the government targeted him in twelve separate mail solicitations emanating from five different fictitious government-created entities, over a two and one-half year period, to induce him to engage in activity that was entirely legal when the government commenced its operation and only became subject to criminal sanctions during the course of the prolonged undercover operation.

There is every reason to believe, as the dissent below observed, that petitioner was enticed by the government's persistence into illegal activity that he had never committed before, and would not have committed this time, had the government merely left him alone. Such patent overreaching cannot be reconciled with the Due Process Clause.

ARGUMENT

I. DUE PROCESS PROHIBITS THE USE OF UNDERCOVER "STING" OPERATIONS ABSENT SOME REASON TO BELIEVE THAT THE TARGETED INDIVIDUAL IS OTHERWISE LIKELY TO ENGAGE IN ILLEGAL ACTIVITY

The concept of due process acts as a constitutional check on the the government's power to investigate and prosecute individuals suspected of illegal activity by invoking "[t]he awful instruments of the criminal law," *McNabb v. United States*, 318 U.S. 332, 343 (1943). Thus, government conduct that is brutalizing, *Rochin v. California*, 342 U.S. 165, 172 (1952); entrapping, *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959); discriminatory, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); or standardless, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), violates due process.

So far, this Court has not elaborated on the scope of due process protection available to targets of undercover operations. However, on several occasions the Court has suggested, albeit in *dicta*, that the government's use of artifice as an investigative tool is properly subject to due process limitations. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973)("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."); *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring)(suggesting that due process might be violated where "[p]olice overinvolvement in crime . . . reach[es] a demonstrable level of outrageousness"). *See also Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

These expressions reflect two complementary concerns: one is the fear of prosecutorial overreaching; the

other is our nation's abiding belief in the presumptive right of every individual to lead his or her life free of government harassment. *Amici* do not suggest that law enforcement personnel may not target an individual for an undercover operation absent the probable cause that would be required under the Fourth Amendment for an arrest. *See Draper v. United States*, 358 U.S. 307 (1959). However, some factual predicate is surely necessary as a safeguard against the government's arbitrary use of law enforcement power in the investigative context. *See United States v. Twigg*, 588 F.2d 373, 381 n.9 (3d Cir. 1973)(lack of factual justification for soliciting persons with no apparent criminal intent an important factor in finding due process violation).

The government itself has recognized the need for an individualized factual predicate before launching an undercover operation that encourages persons to engage in illegal activity. Indeed, the government has imposed a requirement of reasonableness before selecting targets for such operations. The Department of Justice has promulgated comprehensive guidelines "to establish clear and workable procedures for the authorization and review of undercover operations at appropriate levels in both the FBI and the Justice Department." Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on FBI Undercover Operations" 1 (Press Release Jan. 5, 1981).[2] The Guidelines provide that no undercover operation offering inducements to illegal activities is to be approved unless:

> (a) There is a *reasonable indication*, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or
>
> (b) The opportunity for illegal activity has been structured so that there is *reason for believing* that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on FBI Undercover Operations" 16 (Dec. 31, 1980), *reprinted in Law Enforcement Undercover Activities: Hearing before the Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, U.S. Senate, 97th Cong., 2d Sess. 86, 101 (1982)(emphasis added)(hereafter *Senate Hearings*).

Elaborating on the need for a reasoned basis before targeting individuals or organizations, the Department's Guidelines further state:

> A key principle underlying these practices, and reflected in these Guidelines, is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose.

Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations" 1 (Dec. 2, 1980), *reprinted in Senate Hearings*, at 121.[3] Further, consistent

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[2] The Guidelines purport to be "significantly more restrictive than those required by the law of entrapment or the constitutional principles of due process." *Id.* The government's own evaluation of the scope of due process protection in the investigative context is obviously self-serving and of no legal significance.

[3] Moreover, Guidelines established by the United States Postal Inspection Service requires that undercover "sting" operations be directed only at those persons whose names appeared independently on at least two lists acquired from the following sources: mailing lists seized by postal inspectors in separate child pornography investiga- (continued...)

with its reasonableness requirement, the Guidelines also limit the duration of an undercover operation initially to six months. *Senate Hearings* at 120.

The principle embodied in the Guidelines as well as in the Due Process Clause -- that the government target only those persons who have shown a willingness to engage in crime, are currently engaged in crime, or are about to commit a crime -- is not a novel concept. It "derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile persons into lapses which they might otherwise resist. Such an emotion is out of place, if they are already embarked on conduct morally indistinguishable and of the same kind." *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933)(L. Hand, J.).

There is little doubt that the government has ample ability to generate crime by inducing individuals selected at random to violate the law. But it should be equally clear that the Constitution does not permit integrity tests of randomly selected citizens -- whether chosen from mailing lists, voter registration lists, or even telephone directories. *See* Gershman, "Abscam, The Judiciary and the Ethics of Entrapment," 91 Yale L.J. 1565 (1982). Such random solicitation without individualized suspicion

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[3] (...continued)
tions; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI; investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs. Trial transcript at 95, 97, 146-47. In the instant case, petitioner's name appeared on only one mailing list. His name was not on a mailing list involving incoming child pornography seized by the United States Customs Service. His name was not obtained from any program conducted by the FBI. His name was not on any list acquired from child pornography dealers during investigations conducted by metropolitan police or state police agencies. His name was not acquired from the Postal Inspection Service during regional testing programs.

does not implicate merely a prosecutorial policy judgment about effective crime control to which the judiciary should defer. *See United States v. Russell*, 411 U.S. at 435 ("The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations"). Such conduct is a gross violation of the "right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

Indeed, such unjustified intrusions, undertaken without the safeguards of a warrant, *cf. Katz v. United States*, 389 U.S. 347 (1967)(requiring a warrant for electronic eavesdropping), not only violate an individual's privacy and autonomy, but can become a tool of political oppression. *United States v. Jannotti*, 673 F.2d 578, 612-13 (3d Cir.)(Aldisert, J., dissenting). Nor is the government's conduct constitutionally validated because it may succeed in inspiring some persons to engage in illegal activity. Due process is offended because the investigative methods for which immunity is claimed create an unreasonably high risk that innocent persons will be victimized.[4] In this case, petitioner was solicited twelve separate times by five separate government-created entities over a two and one-half year period before he finally succumbed, and purchased a magazine.

In short, the government's conduct in pursuing petitioner in this relentless fashion is offensive to notions of fundamental fairness. The net result of its investigatory tactics is that the government has used its scarce re-

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[4] *See United States v. Myers*, 527 F.Supp. 1206, 1225 (E.D.N.Y. 1981)(noting that three legislators brought to federal agents during the "Abscam" investigation rejected the bribe offers), *aff'd*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 U.S. (1983).

sources to produce an unwitting, government-fashioned criminal who would probably have continued to mind his own business as a law-abiding citizen had the government simply left him alone. *See United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983)(Posner, J., concurring)("If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime").

As Judge Heaney observed in his dissent below:

> [A]ll the time, effort, expense, and ingenuity invested in apprehending Jacobson yielded only a single conviction of a single individual for the receipt of a single magazine that would never have entered the United States mails had the Postal Service not deposited it there in the first place. The investigation of Jacobson produced no new evidence against existing pornography producers or purchasers and did nothing to further the goal of preventing the sexual exploitation of minors.

916 F.2d at 476. In short, the government has violated its own rules, pushed beyond the outer limits established by due process, and now asks this Court to invoke principles of judicial deference that would immunize its behavior from any meaningful constitutional review.

Concededly, "criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sherman v. United States*, 356 U.S. at 372. *See United States v. Russell*, 411 U.S. at 432; *Hampton v. United States*, 425 U.S. at 495-96 n.7 (Powell, J., concurring). Certain crimes, such as contraband offenses and official corruption, could not be investigated effectively without the use of undercover methods of infiltration and deceit. But a distinction should be drawn, as the government's Guidelines do, between an undercover operation that is carefully structured to provide an opportunity only for those persons already bent on illicit behavior to be drawn into criminal activity and those undercover operations, like the one at issue in this case, that are not so carefully structured. *Compare United States v. Gamble*, 737 F.2d 853 (10th Cir. 1984); *United States v. Thoma*, 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.)(*en banc*), *cert. denied*, 457 U.S. 1106 (1982); with *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985); *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984); *United States v. Twigg*, 588 F.2d 373.

The spectre of an undercover operation that actively and persistently targets persons who are suspected of no illegal activity runs afoul of the government's own Guidelines and constitutes an abuse of power. *Sherman v. United States*, 356 U.S. 369; *Sorrells v. United States*, 287 U.S. 435. This is especially true in the context of anti-pornography operations, where the government's use of psychological manipulation through "mirroring," and feigned intimacy from imposter "pen pals," incites and legitimizes an interest in child erotica that may not have previously existed, or that may have existed but would have laid dormant without the government's active interference.

Requiring a reasoned basis before the government may underake a "sting" operation against a targeted individual would not "introduce[ ] an unmanageably subjective standard," *United States v. Russell*, 411 U.S. at 435, into the conduct of investigations or into the judiciary's decisionmaking process. Indeed, under the Guidelines, the government itself has promulgated a reasona-

bleness standard for the conduct of undercover operations. Moreover, in contrast to a less clearly defined "outrageous" standard, *see id.* at 431, a reasonableness standard is quite familiar to courts reviewing issues under the Fourth Amendment. There is no reason to think that such a requirement as a matter of due process in the investigative context would undermine law enforcement or make judicial review more problematic.

To be sure, in the absence of any pronouncement by this Court, some federal courts of appeals that have considered the issue have rejected a "reasoned basis" or individualized suspicion requirement under the Due Process Clause.[5] But no court has held or would hold that there are *no* limits on government's power to initiate investigations. Thus, the rejection of a "reasoned basis" standard merely begs the question as to the appropriate methods that law enforcement may use in the conduct of investigations. Moreover, as noted above, these decisions are inconsistent with the federal government's own Guidelines for the conduct of undercover operations and with the notions of fundamental fairness embodied in the Due Process Clause.

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[5] *See, e.g., United States v. Chin*, No. 90-1503 (2d Cir. May 2, 1991) (rejecting "individualized suspicion" requirement on law enforcement officials in context of undercover investigation of violations of child pornography statutes); *United States v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991)(*en banc*)(rejecting "reasoned grounds" requirement for investigation of counterfeit credit card transactions); *United States v. Jenrette*, 744 F.2d 817, 824 n.13 (D.C.Cir. 1984)(rejecting reasonable suspicion requirement in context of undercover investigations of public officials), *cert. denied*, 471 U.S. 1099 (1985); *United States v. Gamble*, 737 F.2d at 860 (rejecting "reasonable suspicion" requirement in context of undercover investigation of insurance fraud). Absent any guidance from this Court, the federal circuits have concluded, as did the court below, that a person "has no constitutional right to be free of investigation." 916 F.2d at 469; *United States v. Trayer*, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 111 S.Ct. 113 (1990).

II. ACTIVITY PROTECTED BY THE FIRST AMENDMENT MAY NOT PROVIDE INDIVIDUALIZED SUSPICION TO TARGET A PERSON FOR AN UNDERCOVER "STING" OPERATION

The government commenced its undercover investigation of petitioner following its seizure of a bookstore's mailing list showing that petitioner had ordered two nudist magazines and a brochure listing stores selling sexually explicit material. There is no claim that receipt of this material violated any penal statute. Predicating an undercover operation solely upon activity that is protected by the First Amendment infringes upon the constitutional right to read, to observe what one pleases, and to maintain one's own inner life without interference by the government.

A person's right to receive information and ideas, to read what one pleases, and to be free from governmental intrusions into the privacy of one's thoughts is protected by the First Amendment and the Due Process Clause. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Writing for the Court in *Stanley*, Justice Marshall said:

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for

> such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565.

In *Stanley*, the material was obscene under a valid Georgia statute; in the instant case, the material did not violate any statute. Moreover, the government had no reason to suspect that petitioner had ever or would ever violate the law. Thus, the government launched its two and one-half year undercover campaign based solely upon petitioner's receipt of nonpornographic material. By so doing, the government deliberately exploited petitioner's right to personal liberty to think, to feel, and even to fantasize, *see Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 67 (1973)("The fantasies of a drug addict are his own, and beyond the reach of the state"), in order to determine whether he would be susceptible to undercover stimuli, and then repeatedly to encourage him to violate the law.[6]

[6] This case is easily distinguishable from *Osborne v. Ohio*, ___ U.S. ___, 110 S.Ct. 1691 (1990). In *Osborne*, the defendant was convicted for the private possession of child pornography that was unprotected by the First Amendment. Here, the government insists on its right to launch an undercover "sting" operation based solely on petitioner's private possession of erotic material that even the government concedes is entitled to constitutional protection.

Given the constitutional right to distribute reading material through the mail, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and the correlative constitutional right to receive it and read it, *Stanley v. Georgia*, 394 U.S. 557, it is impermissible for the government to utilize the fact that an individual possesses constitutionally protected material or engages in constitutionally protected activity as the basis for criminal investigation and ultimate punishment. *Raley v. Ohio*, 360 U.S. at 438-39 (conviction for refusing to answer question after government assurances that person had privilege to refuse to answer violates due process); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965)(convicting person for illegally demonstrating after government assurances that demonstration was lawful violates due process). In sum, the government should not be allowed to turn the constitutional right to read into a tool of oppression. Such a result would follow if the government were allowed to use the fact of petitioner's name on a mailing list for constitutionally protected materials as the basis for launching an undercover investigation against him.[7]

[7] This Court need not decide whether constitutionally protected conduct can ever be considered in the decision to launch a government investigation. It is sufficient to hold on the facts of this case that an intrusive, undercover "sting" operation should not be undertaken *solely* on the basis of First Amendment activity.

III. PETITIONER WAS ENTRAPPED AS A MATTER OF LAW WHEN THE GOVERNMENT, WITHOUT INDIVIDUALIZED SUSPICION THAT HE WAS LIKELY TO ENGAGE IN ILLEGAL ACTIVITY, TARGETED HIM WITH TWELVE SEPARATE MAIL SOLICITATIONS FROM FIVE SEPARATE GOVERNMENT-CREATED ENTITIES OVER A PERIOD OF TWO AND ONE-HALF YEARS, TO INDUCE HIM TO PURCHASE A GOVERNMENT-MANUFACTURED PORNOGRAPHIC MAGAZINE

The evidence below established entrapment as a matter of law.[8] The government's numerous and persistent inducements and solicitations of petitioner over a two and one-half year period, without any reasoned basis to believe that he was predisposed to engage in illegal activity, finally succeeded in "implant(ing) the criminal design in (petitioner's) mind," *United States v. Russell*, 411 U.S. at 436; *Sorrells v. United States*, 287 U.S. at 442, and rendered his crime "the product of the creative activity of law enforcement officials." *Sherman v. United States*, 356 U.S. at 373. *See Casey v. United States*, 276 U.S. 413, 423 (1928)("The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature") (Brandeis, J., dissenting).

To begin with, at the time the government launched the first of its five undercover "sting" operations against him, petitioner was a law-abiding citizen who was not suspected of having committed any crime, particularly a violation of 18 U.S.C. §2252(a)(2)(knowingly receiving a visual depiction of a minor engaged in sexually explicit

[8] The government has attempted to characterize the issue in this case in terms of "outrageous" government conduct rather than entrapment. In *amici*'s view, the result is the same no matter which label is applied.

conduct).[9] There is no claim that the government was seeking to investigate preexisting criminal activity. *Compare United States v. Russell*, 411 U.S. 423 (drug laboratory); *Hampton v. United States*, 425 U.S. 484 (drug trafficking), with *Sherman v. United States*, 356 U.S. 369 (entrapment as a matter of law where government induced previously law-abiding person to obtain drugs); *Sorrells v. United States*, 287 U.S. 435 (entrapment defense should have been charged where government agent induced previously law-abiding citizen to obtain illicit liquor). There is no claim that petitioner was in the pornography trade, or that the government suspected that he was in the pornography trade. *See United States v. Thoma*, 726 F.2d 1191 (government informed that defendant involved in producing pedophilia). Nor is there any claim that petitioner was producing child pornography. *See United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)(government informed that defendant producing child pornography). The government knew only that petitioner had ordered two magazines depicting nude adolescent males, that did not involve sexually explicit or provocative conduct, and a brochure listing bookstores that sold similar material. The undercover targeting of petitioner violated not only the FBI's Guidelines for the conduct of undercover operations, but also the Guidelines established by the United States Postal Inspection Service for the conduct of undercover "sting" operations. Trial transcript at 346.

Over the next two and one-half years,[10] the govern-

[9] Indeed, the criminal statute for which petitioner was ultimately convicted had not even been enacted when the undercover operations were begun.

[10] It should be noted that the FBI Guidelines attempt to minimize the possibility of overly persistent solicitations by limiting the duration of an undercover operation initially to six months. See *Senate Hearings* at 120.

ment, through the Postal Service, targeted petitioner with twelve separate mail solicitations sent under the auspices of five separate fictitious organizations in order to induce petitioner to purchase a sexually explicit magazine, which he eventually did. In the course of its campaign to entice petitioner, the government engaged in psychological manipulation through a technique known as "mirroring," involving solicitations and correspondence with an imposter "pen pal," in order to stimulate petitioner's interest in erotic material. Government exhibits 11-14; trial transcript at 342. Petitioner occasionally evinced interest in the government's blandishments, but also demonstrated reluctance. He never ordered any material advertized by the fictitious "American Hedonist Society." He did not answer the sexual questionnaire from the fictitious "Midlands Data Research" organization. He did not respond to a letter from the fictitious "Heartlands Institute for a New Tomorrow." Nor did he correspond with any individuals who were referred to him as having "backgrounds and interests similar to yours." After petitioner ceased corresponding with "Carl Long," an undercover agent posing as a "pen pal," the Postal Service, this time using the fifth fictitious entity, "Far Eastern Trading Company, Ltd.," finally succeeded -- after two more solicitations -- in inducing petitioner to order two sexually explicit magazines, for which he was arrested.

Courts determining a defendant's predisposition principally examine the extent to which the government has endeavored to instigate the crime, as well as the defendant's background, in order to see "where he sits on the continuum between the naive first offender and the streetwise habitue." *United States v. Townsend*, 555 F.2d 152, 155 n.3 (7th Cir.), *cert. denied*, 434 U.S. 897 (1977). Courts that have found entrapment as a matter of law have concluded that the defendant was not merely given an opportunity to violate the law, but rather, as here, was encouraged to do so by repeated solicitations

after a failure to readily respond. *See United States v. Sherman*, 200 F.2d 880 (1952)(entrapment as matter of law where defendant did not readily respond to government's initial solicitation but did so only after further solicitation); *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985)(entrapment as matter of law where government repeatedly engaged in direct and indirect solicitations over two year period); *United States v. Lard*, 734 F.2d 1290 (entrapment as matter of law where defendant initially resisted government's solicitation).

The defendant's character and reputation are also important factors in determining predisposition. *United States v. Thoma*, 726 F.2d at 1197; *United States v. Dion*, 762 F.2d at 686, 688. The petitioner had an unblemished reputation, a commendable war record, and lived a quiet life on a farm in Nebraska. As Judge Heaney observed:

> Had the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children.

916 F.2d at 471 (dissenting opinion).

CONCLUSION

For the above reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

INTEREST OF THE AMICI CURIAE*

The National Center for Missing and Exploited Children, the national non-profit resource center for child protection established in 1984, spearheads national efforts to locate and recover missing children, and raises public awareness about ways to prevent child abduction, molestation, and sexual exploitation.

The National Law Center for Protection of Children and Families, a national non-profit law center and clearinghouse which focuses upon legal and research issues surrounding child sexual exploitation and illegal pornography, concentrates on the enforcement of existing laws, the promulgation of the new ordinances and legislation, the defense of such legislation and public/professional education in the areas of sexual exploitation and illegal pornography.

National Coalition Against Pornography is a national non-profit organization which seeks to eliminate child pornography and illegal obscenity city by city across the entire United States through building broad coalitions, raising public awareness and facilitating legal and legislative action.

National Family Foundation is a non-profit organization which was organized to collect, synthesize, and integrate medical, clinical, and social science evidence and theory to bring greater understanding and solutions to the problems of the American children and families.

Athletes for Kids is a non-profit organization representing over 200 professional athletes and dozens of corporate leaders nationwide who have joined together with a common purpose of educating young people about the harms of pornography, drug abuse, and illicit sex.

SUMMARY OF ARGUMENT

A careful examination and comparison of the present facts to three important areas: (1) the nature of pedophilia,

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* A complete description of Amici may be found in the appendix. This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

(2) its underground, secretive network and (3) the uncontroverted link between child pornography and child molestation, will highlight petitioner's predisposition to purchase child pornography and the necessity of reverse stings to pierce the network and help stop the multi-faceted harm to children from child pornography. Pedophiles (persons with a sexual preference for children) and child molesters have many common characteristics. The most pervasive is their use, obsession with, and collection of child pornography and child erotica. Such pornographic material is essential to them for personal stimulation, seduction of children, teaching tools and blackmail to keep their child molestation secret. The network in which pedophiles and child molesters operate to obtain child pornography is now underground, secretive and cautious of unknown individuals. Due to aggressive enforcement, and the nature of the underground pedophile network, traditional investigative techniques, such as purchasing the materials or detecting the producers, has become virtually impossible. Only "reverse stings," where the undercover agent poses as foreign child pornographers, have proven successful to pierce the shroud of secrecy and detect such crimes against children. "Government undercover operations [reverse stings] are severely needed to prevent and deter those who ... purchase ... child pornography." *United States v. Moore*, 916 F.2d 1131, 1138 (6th Cir. 1990).

This Court has recognized in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. ___, 110 S.Ct. 1691 (1990), the serious, multiple harms to children caused by child pornography and strongly recognized the state's "compelling" interest in protecting child victims from child pornography. Since child pornography is child molestation in pictures and in progress—i.e., crime scene photographs—all legitimate avenues must be explored to eliminate child pornography.

Despite the overwhelming evidence to the contrary, petitioner has requested this court to overturn the jury's rejection of the entrapment defense and hold *as a matter*

of law that he was entrapped into purchasing child pornography. First, a jury verdict which rejected the entrapment defense may be overturned *only* if *no reasonable jury* could have found that the government proved predisposition to commit the crime. Second, lack of predisposition is demonstrated only where the government manufactures, not detects, the criminal intent to buy child pornography. In essence, the government merely gave Jacobson the opportunity to exercise his predisposition to purchase child pornography. They did not implant the criminal thought or force the illegal conduct.

Clearly, eight positive responses indicating Jacobson's interest in child pornography and his *two*, not one, purchases of child pornography provide ample evidence of his predisposition. His prior order of *Bare Boys I and II* from a known pornography distributor, his expressed interest in teenage and pre-teenage sexual activity, and his eagerness to receive the explicit sex catalogs and order from them illustrate, at the very least, that Jacobson was not reluctant to commit the child pornography offense. He rose to the bait, repeatedly and without reluctance, where any normal person would have thrown the mailings away, asked that they be stopped, or filed a complaint with the authorities. His final order of *Boys Who Love Boys*, described in the catalog as "eleven year old and fourteen year old boys who get it on in every way possible—oral, anal sex and heavy masturbation," leaves little doubt that he knew what he was doing and was predisposed to purchase such material.

Reverse sting investigations in federal child pornography cases have provided the most effective method to detect and stop the purchase and use of child pornography. Hundreds of individuals, most undoubtedly pedophiles or child molesters, who have been convicted over the past five years, would not have been detected nor caught with traditional investigative methods. The secretive underground network, which distributes and buys child pornography, is a continuing threat to children and can and must

be pierced by "reverse stings" to prevent further sexual abuse of children from child pornography.

ARGUMENT

I. THE SECRETIVE, UNDERGROUND PEDOPHILE AND CHILD MOLESTER NETWORK AND ITS DESPERATE NEED FOR CHILD PORNOGRAPHY REQUIRES LAW ENFORCEMENT TO USE UNDERCOVER STINGS TO DETECT CLANDESTINE CRIMES AGAINST CHILDREN

The very nature of pedophilia and the use of child pornography is so unique that it led the Attorney General's Commission on Pornography in 1986 to say that "because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former."[1] Law enforcement has discovered that the normal investigative techniques employed against even distributors and consumers of adult pornography are not generally successful against distributors or consumers of child pornography.[2]

To properly understand the absolute necessity for undercover tactics and mail order reverse stings in child pornography cases, it is critical to first comprehend three important things:

(1) the nature of pedophilia and child molestation;

(2) the workings of the secretive, underground pedophile and child molester network; and

(3) the direct connection between child pornography and child molestation, and its link in the circular chain of child sexual victimization.

A comparison of the present facts to these three areas will hopefully enlighten the Court concerning Jacobson's

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[1] *Attorney General's Commission on Pornography*, Final Report, July, 1986, p. 410 [hereinafter *Commission on Pornography*].

[2] *Id.* at 406.

predisposition and the necessity of reverse stings to stop the multi-faceted harm to children from child pornography.

A. Pedophiles And Child Molesters Are Obsessed With Child Pornography And Thus Have A Unique Predisposition To "Reverse Stings."

Law enforcement, media, and the public often use *pedophile* and *child molester* interchangeably; however, they are not synonymous terms. The term *pedophilia* is commonly used to mean "a sexual perversion in which children are the preferred sexual objects." Technically, however, pedophilia is a psychiatric disorder defined as essentially "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' duration involving sexual activity with children."[3] While all pedophiles have a sexual preference for children, they can and do have sex with adults and span the full spectrum from saint to monster. A child molester, however, may not have a sexual preference or fantasy for children, but may sexually abuse children due to availability, avoidance of sexually transmitted disease from adults, curiosity, or desire to hurt a loved one of the molested child. On the other hand, a pedophile may not act out his fantasies or preference for having sex with children and thus not become a child molester.[4]

One common characteristic of both pedophiles and child molesters is the *use and consumption of pornography*. As one FBI behavioral scientist has said: "Child pornography exists primarily for the consumption of pedophiles. If there were no pedophiles, there would be little or no child pornography . . . ."[5]

A 1983 study by Dr. William Marshall revealed that eighty-seven percent (87%) of child molesters of girls and

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[3] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271 Section 302.20 (3rd ed. 1980).

[4] K. Lanning, *Child Molesters: A Behavioral Analysis* 1-3 (2d ed 1987) [hereinafter *Child Molesters*].

[5] *Id.* at 18.

seventy-seven percent (77%) of child molesters of boys admitted regular use of pornography. Pornography was reportedly used for three main purposes:

(1) to stimulate the viewer or child molester;

(2) to destroy or lower the natural inhibitions to sexual activity in their intended child victims; and

(3) to teach children to imitate the conduct in their real life sexual encounter with an adult.[6]

According to the Congressional Subcommittee on Child Pornography and Pedophilia, "no single characteristic of pedophilia is more pervasive than the obsession with child pornography."[7] In short, pedophiles and child molesters crave and use child pornography and are real, continuing threats to children.

Another common trait identified through research and law enforcement experiences is that both pedophiles and child molesters are *collectors of child pornography and child erotica*.[8] These sexually explicit collections are always kept in secret, often catalogued and well organized, and generally used for stimulation, seduction, validation of the

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[6] W. Marshall, *Report on the Use of Pornography by Sexual Offenders, Report to the Federal Department of Justice*, Ottawa Canada (1983) see also W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-Offenders*, 25 J. of Sex Research 267-288 (1988).

[7] U.S. Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, *Child Pornography and Pedophilia*, 99th Cong., 1st Sess. (1986) (Available at the U.S. Government Printing Office, Washington, D.C.) 46 [hereinafter *Child Pornography and Pedophilia*].

[8] *Child Molesters* at 17. Child erotica, which is a broader and more encompassing term than child pornography, is any material, relating to children, that serves a sexual purpose. Child erotica can be published material on child development, man-boy love, nudism, personal advertisements, men's magazines, adult pornography advertisements, access to children, etc., and unpublished material such as diaries, letters, newsletters, telephone and address books. *Id.*

deviant behavior or blackmail of the victim to keep his secret.[9]

Once one understands this distinctive characteristic of pedophiles and child molesters, it is obvious that no one but a person predisposed to the use of child pornography would have answered any of the mailings sent by the postal inspectors. An ordinary citizen who was not predisposed would have: (1) thrown the material out, (2) contacted the postal authorities to stop any further delivery, or (3) approached the police about filing a complaint. The petitioner did none of the above, but answered all of the mailings in various affirmative ways. His persistence in corresponding to obtain child pornography is consistent with the single most pervasive characteristic of pedophilia: obsession with child pornography for use and collection.[10]

Pedophiles and child molesters have two additional important common traits: (1) *desired access to children*, and (2) *seduction rather than force for sexual exploitation of children*. Because of their excessive interest in children,

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[9] *Id.* at 17-18. Pornography (such as men's magazines) is initially shown to the child casually for "sex education" to raise the curiosity level of children who are often surprised and bewildered about the sex acts. Once adult pornography has convinced the child that sex is acceptable, even enjoyable, child pornography is introduced to show that other children participate in sexual activity with adults or peers. Continued showings of child pornography will lower the natural inhibitions of a child to a point where kissing and sexually touching of the child may be accomplished by the molester. Eventually, the seduction process progresses to more explicit activity between the child and adult or other children using child pornography as instructional aids. S. O'Brien, *Child Pornography*, 89-90 (1983). Finally, still photographs in a "modelling session," home video movies, or professional filming occur for blackmail, personal collection of memories, future stimulation, trade with other molesters, commercial sale, or use to seduce other child victims. D. Campagna and D. Poffenberger, *Sexual Trafficking in Children*, 118 (1988) [hereinafter *Sexual Trafficking*].

[10] *Child Pornography and Pedophilia* at 4.

pedophiles will gravitate to boy scout leadership, day care work, school bus driving, etc., and will often frequent schoolyards, arcades, and shopping centers to socialize with children.[11] The abuser, by meeting the children on their own "turf," begins the process of seduction that leads to the abuse and eventually to continued activity in the underground network.

Significant characteristics of pedophilia and child molestation appear to be present in petitioner's situation. First, his access to the children comes through his more than ten years as a bus driver in a public school system. Second, *Bare Boys I* and *Bare Boys II* may not be child pornography but, under anyone's criteria, they are child erotica. There appears to be no other legitimate rationale for this petitioner owning pictures of naked boys other than for sexual stimulation. As stated previously, child molesters/pedophiles seem to be the only market for child erotica and child pornography. In fact, in a study conducted by the Los Angeles Police Department,child pornography and child erotica were categorized together as pornography because "... both types serve identical purposes" for the pedophile/child abuser: "to desensitize the child and lower his or her inhibitions."[12] After their investigation, the Senate's Permanent Subcommittee concluded, "The seizure (of child pornography/child erotica) often is the first indication that the recipient may be molesting children."[13] Finally, Jacobson's expressed interest

[11] *Id.* at 11-15.

[12] R. Bennett, "The Relationship Between Pornography and Extrafamilial Child Sexual Abuse", *The Police Chief*, 19 (February 1991). [hereinafter *Pornography and Child Sexual Abuse*]. The review of all arrests for sex crimes against children (extrafamilial child sex abuse cases) from 1980-1989 revealed that pornography was discovered in eighty-eight percent (88%) of cases, with child pornography recovered in over twenty-three (23%) of the cases. According to the study, "Clearly pornography is an insidious tool in the hands of the pedophile population. The study merely confirms what detectives have long known: that pornography is a strong factor in the sexual victimization of children." *Id.* at 19.

[13] *Child Pornography and Pedophilia* at 37.

in teenage and pre-teenage sexual activity and his purchase of such sexually explicit material is clearly consistent with such uniquely characteristic traits.

B. The Underground Child Pornography Network By Its Secretive Nature Requires Innovative Reverse Stings To Infiltrate And Detect Child Pornography Crimes.

By knowing the intricate workings of the child pornography network and the indicia of membership in the network, the Court will better understand that only certain people will rise to the bait offered by the postal inspector or customs agent.

In *Ferber*, 458 U.S. at 747, child pornography became a serious separate crime which was easier to prosecute, and consequently, law enforcement has been aggressively investigating such offenders. Since *Ferber*, organized crime's commercial interest has waned and an underground "cottage" industry and clandestine pedophile network have taken over.[14] The consumers of child pornography are often the producers of the material and/or the distributors of the material. The United States Senate's Permanent Subcommittee on Investigations concluded that "the distribution of child pornography in the United States is largely carried on by individual pedophiles, who *produce* this material and trade it among themselves or order it through the mail from other countries."[15] "The greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion,"[16] and more than any single factor, this demands covert behavior by both the pedophiles and the police. Moreover, the producer is, in fact, a child abuser because the pro-

[14] It should be noted that there still "... is a domestic commercial pornography industry, but it is *quite clandestine*, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children." *Commission on Pornography* at 409.

[15] *Child Pornography and Pedophilia.*

[16] *Commission on Pornography* at 410.

duction of "child pornography necessarily includes the sexual abuse of a real child."[17]

This underground network creates a serious problem for investigation and apprehension of these child abusers. The police cannot simply trace material back to a distribution point, or subpoena the records of a known publication company, and they certainly are unable to go door to door and ask Mr. and Mrs. Public if they consume child pornography. In order to ferret out the consumers, producers and distributors of child pornography, the police must be allowed to aggressively seek out this underground network. The most effective method of detecting such crimes is to enter one of the underground network channels. There are two identifiable channels of this network: "(1) the cottage industry and (2) a commercial network for child pornography, consisting to a significant extent of foreign magazines . . . ."[18] These two facets are, however, irrevocably linked to one another to the detriment of the children pictured in the child pornography material.

Since most of the material presently being distributed by the magazines and videos is simply collections of non-commercially produced pedophile collections,[19] without the initial abuse by the pedophile, there would be no non-commercial child pornography. Likewise, since pedophiles and child molesters are the only known consumers, there would also be very limited commercial child pornography distribution. This symbiotic, parasitic behavior by the producers, distributors, collectors, and users of child pornography is at the heart of the government's strategy in the

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[17] *Id.* at 406.

[18] *Id.* at 408.

[19] *Id.* at 408. These photographs are edited in some semblance of order and circulated as completed magazine issues. The production of the material first abuses the child when the sexual behavior occurs and is filmed, and then again when the pictures are traded, sold or distributed through the magazines.

"Project Looking Glass" and "Operation Borderline" reverse stings.[20]

Petitioner contends that his responses to the postal inspector's mailings were innocuous and without sinister connotations. The evidence is, however, quite to the contrary. Child pornography and its distribution is a clandestine business and as such, is not only difficult to detect, but even when a suspect is detected, his secretive nature often makes investigation difficult because he is extremely cautious in his dealings with unknown individuals. It was not until after several contacts with the "overseas child pornography distributor" that petitioner let down his guard and ordered the child pornography. However, it was obvious throughout his correspondence that petitioner was very interested in the materials. He wanted information about teenage and pre-teenage sexuality and eventually ordered *Boys Who Love Boys* and other child pornography without there being any doubt as to the nature of the material. The petitioner cannot hide behind the common ploy of many child pornography collectors that his caution is actually a lack of interest or predisposition. Only those who are stimulated in some way by the child pornography would even consider responding.

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[20] In the present case, the petitioner positively responded and ordered child pornography from these two undercover "reverse stings" conducted by the U.S. Postal Inspectors and U.S. Customs agents respectively. Such innovative investigative operations were pioneered because the traditional attempts to buy child pornography from sophisticated and cautious individuals involved with the underground pedophile and child molester network had been, for the most part, unsuccessful. Essentially, both "reverse stings" were set up as follows: (1) establish an overseas corporation posing as commercial child pornographers; (2) identify and mail inquiry letters and surveys to suspects from other pornography mailing lists or convictions for child sexual offenses; (3) if positive responses and requests for catalogs are received, mail a catalog describing the explicit sexual materials involving children; (4) process the order and monetary pre-payment for the child pornography to arrange for delivery and search; and, (5) make a controlled delivery of the child pornography with a search of the premises to immediately follow.

C. Child Pornography Is Directly Connected With Child Molestation.

The rapid growth of child pornography[21] reveals a demand for material by individuals who are stimulated, even obsessed, by depictions of sexual activity with children. Law enforcement studies have verified that pedophiles and child molesters almost always collect child pornography and child erotica.[22] A recent study of 1,400 child sexual exploitation cases reported in Louisville between July 1980 and February 1984 shows that a significant number of molestation cases involve child pornography.[23] Over forty major cases, involving twelve or more child victims, were studied in depth in Louisville and that research revealed that *all* involved various forms of adult pornography and, in most cases, child nudes and/or child pornography were found at the molester's premises.[24] "Detective William Dworin of the Los Angeles Police Department estimates that of the 700 preferential child molesters (pedophiles) in whose arrest he has participated during the last ten years, more than half had child pornography is their possession. About eighty percent (80%) owned [some type of] pornography."[25] Child pornography plays a central role in child molestation by pedophiles and child molesters, serving to justify their conduct, assisting them in seducing their victims and providing a means to blackmail the children they have molested in order to prevent exposure.

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[21] A U.S. Senate inquiry concluded that child pornography was a highly organized industry grossing several million dollars per year. S. Rep. 95-438, 2nd Sess. 42(1978). In recent years more than one million children have been photographed in sexually explicit poses or while engaging in sexual acts with adults or with other children. D. Scott, *Pornography, Its Effect On the Family*, Community and Culture 17 (1985).

[22] *Child Molesters* at 17-25.

[23] *The Effects of Pornography on Children and Women*, Hearings before the Subcommittee of Juvenile Justice, Committee on the Judiciary U.S. Senate (testimony of John Rabun, for the National Center for Missing and Exploited Children, Sept. 12, 1984).

[24] *Id.*

[25] *Child Pornography and Pedophilia* at 40-60.

The connection between child pornography and child-molestation is graphically played out during the "seduction process" which involves the use of pornography as a method to lower inhibitions or as an instructional tool.[26] As one investigator detailed,

> It was seduction. . . . Once the pedophile realizes that secret would be kept, the next time the children would visit, they would see another type of magazine, something like *Schoolgirls*, *Lolita* or, again, if you are a boy lover, something like *Piccolo*.
>
> These magazines depict children in the act of sexual molestation, oral copulation, sexual intercourse, sodomy, fondling, and masturbation. When looking at this material, the children appear to be enjoying it. . . . [T]he children would look at the magazines or movies, videotapes, photographs of other children and would question, "Doesn't this hurt, isn't this wrong?"
>
> And the pedophile would demonstrate that it doesn't hurt, that it's a good feeling, a tickling sensation This is the beginning of the molestation.[27]

In short, the cycle of sexual exploitation of children has at its center pornography for enticement, seduction,[28] instruction and blackmail.[29]

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[26] K. Lanning, "Collectors", in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984).

[27] Lt. Thomas Rogers, testimony submitted to the Attorney General's Commission on Pornography, Washington, D.C. (November 20, 1985) (available at the National Archives in Washington, D.C.). See also *Report of Surgeon General's Workshop on Pornography and Public Health*, U.S. Department of Health and Human Services 13 (August 1986) [hereinafter *Surgeon General's Report*].

[28] O'Brien, *Child Pornography* 1, 89-90 (1983). See Also, *Commission on Pornography* at 138.

[29] See Burgess, Groth, and McCausland, *Child Sex Initiation Rings*, 51 Amer. J. Orthopsychiat. 110, 114 (1981). See also, *Sexual Trafficking*.

Even more alarming than the rising statistics of child sexual abuse[30] and its connection to child pornography is what researchers are now referring to as the *cycle of child victimization*.[31] As previously discussed, most sexually exploited children are seduced into participating in sexual activity with adults. Some are missing children (runaways, thrownaways, non-family abductions) who are exploited through prostitution and pornography, and some are relatives or children in the neighborhood of the molester.[32] While no conclusive studies or statistics are available, it is clear that a significant number of sexually abused children become molesters if not treated early and adequately. According to Gary Bishop, a convicted homosexual pedophile who murdered five boys in order to conceal his sexual abuse of them,

> For me, *seeing pornography was like lighting a fuse on a stick of dynamite. I became stimulated and had to gratify my urges or explode . . . all boys became mere sexual objects.* My conscience was desensitized and my sexual appetite entirely controlled by actions." He then goes on to tell how he sexually abused then killed his boy victims.[33] (emphasis added)

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[30] Child sexual abuse continued to rise with a three fold increase occurring between 1980 and 1986, with 138,000 reported and confirmed cases of child sexual abuse in 1986. *See* National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Service, *Study of National Incidence and Prevalence on Child Abuse and Neglect* (1988 (NIS-2)). However, estimates of actual child sexual abuse greatly exceed 138,000. It is estimated that "one in three females and one in ten males will be sexually molested before the age of 18; and four million child molesters [are believed to] reside in this country." U.S. Department of Justice, *Network News* 7 (Fall 1985).

[31] H. Davidson and G. Loken, *Child Pornography and Prostitution* 2-3, (National Center for Missing and Exploited Children 1987) [hereinafter *Child Pornography*]; *Child Pornography and Pedophilia* at 100-101.

[32] *Child Molesters* at v-vi.

[33] V. Cline, *Pornography Effects: Empirical & Clinical Evidence* 15 (1988) (available form the Department of Psychology, University of Utah, Salt Lake City Utah 84112).

According to recent studies, homosexual and heterosexual child molesters average between thirty and sixty child victims respectively before being caught and preferential child molesters will sexually abuse an average of 380 children in their lifetime.[34] If even some of the 380 children become molesters who in turn sexually abuse 380 children, the exponential increase of sexual exploitation of the children in the second and third generations would be staggering. The Los Angeles Police Department reports that most child molesters (80%) were themselves molested as children and that they generally seek out victims of the same age and sex as when they were first molested.[35] Scientific research has verified this law enforcement study by finding that fifty-seven percent (57%) of the child molesters studied reported that they were themselves molested as children.[36]

When the Court compares all the aspects of the case with the research data surrounding pedophiles and child pornography, the inescapable conclusion is that the petitioner acted as only a pedophile or child molester would act. Petitioner at anytime could have not responded or just said "no" to the solicitation mailings and been done with it all. But, instead, he chose to follow through to the end. The distribution and consumption of child pornography must be stopped, but due to its underground and secretive nature, the task presents significant obstacles. Certain law enforcement techniques, such as reverse stings, are essential to pierce the secretive network and ferret out those who would abuse or cause the abuse of our children through pornography.

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[34] G. Abel, *Sexual Aggressive Behavior* (1986).

[35] *Child Pornography and Pedophilia* at 52-53.

[36] Carter, *Use of Pornography In the Criminal and Developmental Histories of Sexual Offenders*, Report to the National Institute of Justice and National Institute of Mental Health (1985) (hereinafter *Use of Pornography*); see also *Surgeon General's Report* at 13.

II. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM BEING VICTIMIZED BY CHILD PORNOGRAPHY JUSTIFIES THE USE OF UNDERCOVER OPERATIONS TO IDENTIFY CONSUMERS OF CHILD PORNOGRAPHY

Less than a decade ago, this Court identified the prevention of sexual exploitation and abuse of children as constituting a government objective of surpassing importance. *Ferber*, 458 U.S. at 757. Previously, in *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), this Court stated that ". . . a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."

The problem of harm to the victimized children from child pornography is well documented in research, law enforcement data and the decisions of this Court and should be considered in any balancing test. See, *Ferber*, 458 U.S. 747; *Osborne*, 495 U.S. ___, 110 S.Ct. 1691.

A. Child Pornography Involves Substantial Harm To Children.

Considerable evidence has accrued over the years about the psychological and physical injuries inflicted on children as a result of their participation in child pornography.[37] The effect of being a subject in child pornography can be devastating.[38]

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[37] The *Ferber* Court explained *inter alia* as follows:

> It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults . . . . [S]exually exploited children [are] predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution . . . ." *Ferber*, 458 U.S. at 758 n.9.

[38] In western society there is virtual unanimity that early adult/child sexual activity causes harm to the child. *See e.g.*, U.S. Dept. of Health and Human Services, *Child Sexual Abuse: Incest, Assault, Sexual Exploitation* 7 (1981); R. Holmes, *The Sex Offender and the Criminal Justice System* 91-103 (1983); Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980); R. Lusk and J. Waterman, "Effects of Sexual Abuse of Children," in *Sexual Abuse of Young Children* 101-118 (K. MacFarlane and J. Waterman eds. 1986); Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am J. Orthopsych. 237 (1978).

Child sexual abuse frequently results in identifiable behavioral changes caused by emotional distress.[39] However, fewer than six percent of these cases are reported.[40] Apparently, children fail to speak out about sexual molestation because they believe they did something wrong to bring about the abuse.[41] Most disturbing is the discovery that children who are sexually abused are more likely when they reach adulthood to victimize young children, particularly their own.[42] In fact, of all sexual crimes, the recidivism rate for pedophile offenders is second only to exhibitionists.[43]

Among the physical injuries suffered by children in the production of pornography are sexually transmitted diseases.

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a pain-

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[39] J. MacDonald, *Rape Offenders and Their Victims* 120-145 (1971); Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law* 684 (R. Slovenko ed. 1965); J. Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 Psychiatric Q. 100-103 (1956).

[40] Prager, *Sexual Psychopathy and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49,62 (1982); Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 Dick L. Rev. 691-719 (1985).

[41] S. O'Brien, *Child Abuse: A Crying Shame* 18 (1980).

[42] *See e.g.*, D. Finkelhor, *Child Sexual Abuse: New Theory and Research* 47 (1984); Berliner, Blick, and Buckley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in ABA National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law* (5th ed. 1984); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969).

[43] American Psychiatric Association, *Diagnostic and Statistical* Manual of Mental Disorders 271 (3rd ed. 1980).

> ful vagina, stretched many times its normal size because [she was used] for sexual gratification.[44]

Hundreds of photographs presented to the Commission on Pornography further illustrate the physical harm: "pitiful boys and girls with their rectums enlarged to accommodate adult males and their vaginas penetrated with pencils, toothbrushes, and guns."[45]

The end-result of pedophiles acting-out pornographic sexual/sadistic depictions of children which they view can be death. One series of child pornography photographs shown to the Attorney General's Commission on Pornography "focused on a cute, nine-year old boy who had fallen into the hands of a molester. In the first picture, the blond lad was fully clothed and smiling at the camera. But in the second, he was nude, dead and had a butcher knife protruding from his chest."[46] Many cases have been reported in which a sex-related murder may have been patterned after a depiction found in a pornographic magazine or film.

Distribution and sale of child pornography harms children in ways which some researchers believe are more severe and long lasting than harm from production.[47] Child

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[44] *Commission on Pornography* at 209. Health officials have been alerted for over a decade that infantile gonorrhea is an indicator of sexual assault. S. Sgroi, *Kids With Clap: Gonorrhea as an Indicator of Child Sexual Assault*, 2 Victimology 251-267 (1977); S. Sgroi, *Pediatric Gonorrhea Beyond Infancy*, 8 Pediatric Ann. 5 (1979).

[45] J. Dobson, "Enough is Enough," in *Pornography, A Human Tragedy* 116 (1986).

[46] *Commission on Pornography* at 505.

[47] The *Ferber* court noted as follows:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

('[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions and increases the emotional and psychic harm suffered by the child'). *Ferber*, 458 U.S. at 759 n.10.

pornography has a life of its own. The depictions are timeless and may be distributed and circulated for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again. The harm to children from pornography occurs as a result of the existence of the material itself.

B. Special Harm To Child Victims Demands Innovative "Reverse Sting" Operations To Stop The Devastation Which Child Pornography Causes To Children.

This Court in *Ferber* ruled that the state's "compelling" interest in protecting child victims from sexual exploitation through child pornography was of "surpassing importance." 458 U.S. at 757. This Court last year in *Osborne* held that mere private possession of child pornography could be proscribed and reaffirmed that "it is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " 495 U.S. ___, 110 S.Ct. at 1696 (quoting *Ferber*, 458 U.S. at 756-757).

State and federal courts have consistently recognized this legitimate state interest in regulating, and eliminating, child pornography because of its overwhelming harm to children. Last year Congress enacted The Child Protection Restoration and Penalties Enhancement Act of 1990, making it a federal crime to knowingly view or possess sexually explicit conduct involving minors.[48] The reasoning for such new federal legislation is clear:

> The sexual exploitation of a child is one of the most heinous crimes any person can commit. Those who possess and view this material com-

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[48] Pub. L. 101-647, § 322, 104 Stat. 4816 (1990).

> prise the market for this underground industry. Frankly, I am at a loss to find acts which are more despicable, heinous, and deserving of such serious penalties than the sexual exploitation of our young people. [This Act] is crucial to stemming the flow of vicious crimes against children and the exploitation of them. Penalties for the possession, viewing, and dissemination of this material will be a deterrent to those who would use children to produce this illicit material. Those who steal the innocence away from our children must face harsh punishment." Sen. Thurmond 136 Cong. Rec. S4728-02.

This Court can also make a strong statement to prevent such harms by upholding such undercover stings against child pornographers. The conclusion reached by the Los Angeles Police Department in its 1991 comprehensive sex offender study should be the watchwords for the decision: "pornography is a dangerous weapon in the hands of the pedophile and is used extensively in extrafamilial sexual victimization of children.[49]

III. JACOBSON'S NUMEROUS POSITIVE RESPONSES INDICATE HIS INTEREST IN CHILD PORNOGRAPHY AND DEMONSTRATE THAT AS A MATTER OF LAW, NO ENTRAPMENT OCCURRED

A. Courts Have Recognized The Difficult Detection Of Child Pornographers Requires Sting Operations To Pierce The Underground, Clandestine Pedophile Network.

As previously discussed, research and law enforcement experience have clearly illustrated that the insidious nature of child pornography makes it difficult to detect. In addition, this Court has also emphasized the problem of apprehending child pornographers, where the very nature of the activity is clandestine. For example, the Court in *Osborne* noted this problem when Mr. Justice White, writing

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[49] *Pornography and Sexual Abuse* at 20.

for the Court said, . . . since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." 495 U.S. at ___, 110 S.Ct. at 1697. Earlier, the Court also observed that ". . . the transmission of child pornography through the mails occurs within a shroud of secrecy . . ." *United States v. Johnson*, 855 F.2d 299, 305 (6th Cir. 1988), and the possibility of apprehending the violators through normal procedures is almost non-existent.

The problem of detection and the underground nature of child pornography also have been consistently emphasized by lower appellate courts' rulings on reverse stings involving child pornography. The Tenth Circuit Court of Appeals concluded: ". . . it was reasonable for the postal inspectors to assume that the only way they could ferret out suspected pedophiles 'was to encourage . . . what was otherwise being done or what they thought was being done.' " *United States v. Esch*, 832 F.2d 531, 539 (10th Cir. 1987). Likewise, the Eighth Circuit Court of Appeals stated that "the nature of the production, distribution, and sale of child pornography itself justifies this type of undercover operation to be utilized against those who order it." *United States v. Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989).

The reverse stings by the postal and customs authorities, of which Jacobson was a part, clearly were motivated by these deep concerns about the burgeoning underground network of pedophiles and child molesters who use child pornography. However, numerous precautions were taken to focus only upon those individuals who were involved in child pornography. The Postal Inspectors established strict guidelines to target only individuals who had some predisposition to receive or traffic in child pornography. In the petitioner's case, the inclusion of his name on *Electric Moon*'s mailing list, the ordering of the magazines *Bare Boys I & II* and the request for the sexually explicit catalog illustrate his strong predisposition to obtain child pornog-

raphy. After gleaning petitioner's name from the above, the postal inspectors instituted an investigative procedure to determine whether Mr. Jacobson was in fact involved in buying child pornography. According to the record, "Jacobson responded *with interest* on eight occasions, "showing a strong predisposition to engage in the illegal conduct of purchasing child pornography." *United States v. Jacobson*, 916 F.2d 467, 468 (8th Cir. 1990) (emphasis added).

Despite this overwhelming evidence, Jacobson claims that he was entrapped *as a matter of law*—the only issue accepted for argument by the Court. In the instant case, the jury soundly rejected Jacobson's entrapment defense. Any judicial review of entrapment, as a matter of law, should focus on two issues: (1) whether the jury's rejection of the entrapment defense may be overturned; and (2) whether the defendant was entrapped as a matter of law.

B. Overturning The Jury's Rejection Of The Entrapment Defense Is Unwarranted In This Case.

It is well established that a jury finding on the issue of entrapment will not be disturbed unless no rational trier of fact could have found predisposition to exist beyond a reasonable doubt. *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1989), *United States v. Jannotti*, 673 F.2d 578 (3rd Cir.), *cert. denied*, 457 U.S. 1106 (1982).

To overturn the jury verdict, the Court must find that *uncontradicted* evidence viewed *in the light most favorable to the government* shows clearly that the government was the manufacturer rather than simply a detector of crime." *Jacobson*, 916 F.2d at 470 (emphasis added). In sum, a court "may overturn the jury's rejection of the entrapment defense *only* if *no reasonable jury* could have found that the government proved predisposition beyond a reasonable doubt based on the evidence at trial." *United States v. Jenrette*, 744 F.2d 817, 822 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (emphasis added).

The only legitimate occasion for disturbing the jury's decision to reject the defense of entrapment occurs when the appellate court holds that as a matter of law, predisposition was not proven beyond a reasonable doubt. See *Hunt*, 749 F.2d at 1078; *Jenrette*, 744 F.2d at 822; and *Jannotti*, 673 F.2d at 578. In *Hunt*, the Court said "predisposition is necessarily a nebulous concept, and has generally been held to be a question for the jury, unless the evidence is insufficient as a matter of law." 749 F.2d at 1085. To overturn the jury verdict, a very high burden must be overcome and "we must assume that the trier of fact drew all permissible inference[s] . . . ." *United States v. Thoma*, 726 F.2d 1191, 1197 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

C. No Improper Inducement Nor Lack Of Predisposition Exists In The Instant Case To Find Entrapment As A Matter of Law.

The only proper manner to judge the merits of the jury's verdict is to compare their decisions with findings in other cases. While there are a significant number of reported cases concerning predisposition, it must be noted that before the threshold of entrapment as a matter of law may be broached, the Court must find that there is no dispute as to the credibility of witnesses or the interpretation of the evidence. *United States v. Gambino*. 788 F.2d 938, 944 (3rd Cir. 1986). In the instant case, there is a hot dispute as to the interpretation of the evidence and it is argued that the petitioner's own testimony lacks credibility.

Assuming *arguendo* that a review of the jury's decision is even justified, parameters for such review have been clearly established. Any examination must be two-fold because ". . . the Court has consistently adhered to the view . . . that a valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition . . . ." *Matthews v. United States*, 485 U.S. 58, 60-61 (1988).

(i) Mail Correspondence Is Clearly Unobtrusive And Proper Inducement To Detect Such Crimes.

The first prong of the review is an examination of the inducement offered by the government. In *Jacobson*, the government on four different occasions corresponded with

the petitioner through the mail and on each occasion he responded affirmatively in some fashion. There never was a face-to-face meeting between agents of the United States and the petitioner. A review of the leading cases in this area indicate that inducement (or contact) that was far more invasive than in the present case was routinely upheld as not being improper government inducement. For example, in *United States v. Russell*, 411 U.S. 423 (1973), government agents had numerous meetings with the defendant and supplied a necessary ingredient in the production of the illegal substance and yet the Court ruled that this face-to-face inducement did not violate the first prong of the entrapment test. In *Hunt*, the undercover operatives went face-to-face with a judge and even played their parts as organized crime types to the hilt by threatening bodily harm and still the Court said that was not undue pressure. 749F.2d 1078. See also *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983).

In *United States v. Spivey*, 508 F.2d 146 (10th Cir. 1975), the government agent took a recently released convicted felon into his home, gave him money, charged him no rent, and supplied Spivey with marijuana on a regular basis in a scheme to catch Spivey in the sale of heroin. The court felt that even this almost unbelievable activity by a government agent was not such an undue inducement so as to defeat the jury verdict.

Three cases which found improper government inducement highlight why entrapment as a matter of law did not occur in the case at bar. *Sherman v. United States*, 356 U.S. 369 (1958), (face to face contacts and free gifts of narcotics to a known drug addict who is trying to break the habit); *Sorrells v. United States*, 287 U.S. 435 (1932), (face to face contact with an old "war buddy" who incessantly badgers Sorrells to produce illegal "whiskey," when he had never made whiskey before); and *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), (defendant, who is prepared to engage in a legal transaction (the sale of a shotgun and detonator), is badgered by the undercover operative who insists that only a "pipe bomb" will suffice).

In *Jacobson*, all contacts were made by mail to which petitioner eagerly responded affirmatively though he was never told what to do and certainly never pushed to purchase any certain item. He was simply afforded the opportunity to order child pornography and only an affirmative action by him started the criminal activity. It is ". . . well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells*, 287 U.S. at 441. From a review of these cases, it is apparent that unless the inducement to commit the crime is much more compelling than simple mailings, the first prong of the entrapment review will not be met.

(ii) Eight Affirmative Responses From Jacobson Provide Ample Predisposition To Commit The Crime Of Receiving Child Pornography.

The second prong is closely related in that, "predisposition may be proved by showing that the defendant 'responded affirmatively to less than compelling inducements . . . .'" *Jenrette*, 744 F.2d at 822-823 *citing United States v. Burkley*, 591 F.2d 903, 916 (1978); see also *Gambino*, 788 F.2d at 945 *citing United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 783 (1971).

An understanding of predisposition is not complete unless one is cognizant that certain violations of the law are significantly more difficult to detect than other types of violations. The court recognized this factor in *Russell*, 411 U.S. 423 (1973) (illicit sale of narcotics); *Williams*, 705 F.2d 603 (1983), (bribes taken by government officials); and *Esch*, 832 F.2d 531 (1987), (distribution of child pornography).

As previously discussed, the pedophile, child pornographer or child molester does not sexually abuse children, produce or trade or collect pornography, or practice his seduction techniques in the light of day. The law enforcement officers must be permitted to use "stealth and strategy" to apprehend such violators. *Sherman*, 356 U.S. at

372. See also *Grimm v. United States*, 156 U.S. 604 at 609-610 (1895). "The appropriate object of this permitted [undercover] activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." *Sorrells*, 287 U.S. at 441-442.

This perspective was advanced by the various courts that heard the *Abscam*[50] cases. *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 908 (1983). In those cases, the courts were confronted with men in positions of trust and honor and agreed that there was not a way to detect such criminal behavior save putting out inducements and seeing who would rise to the bait. *Kelly*, 707 F.2d at 1473-74.

In *Jannotti*, the Court felt so strongly about the difficulty of detecting certain crimes that even absent prior indicia of predisposition, the "... very acceptance of a bribe by a public official may be evidence of predisposition ...." 673 F.2d at 604. The parallel to petitioner's case would be that those who order sexually oriented material of children by mail expose their predisposition. Contrary to *Jannotti*, the petitioner in this case was sent a mailing, albeit more than one, and on every occasion responded affirmatively in some fashion. Using the *Jannotti* reasoning, the final action of ordering and paying for child pornography in *Jacobson* is, in and of itself, adequate proof of predisposition, regardless of the other *seven* positive responses.

A final insight from the *Abscam* case may be extracted from *United States v. Myers*, 635 F.2d 932, 939 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980), where the Court

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[50] *Abscam* was an FBI undercover sting operation that derived its name from the first two letters of *Abdul Enterprises* and "scam" (meaning a plan or hoax). Abdul Enterprises was a fictitious organization created by the FBI to ferret out law makers predisposed to abusing their power for financial gain.

discusses the clandestine nature of the crime and the pitfalls of the investigation. "Any member of Congress approached by agents conducting a bribery sting can simply say 'No.' Each member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against risk ...." 635 F.2d at 939. Was not the same true of Jacobson? Just as the members of Congress (who do not advertise their skulduggery) are susceptible to their predisposition by rising to the bait, so is the child pornographer susceptible to his own proclivities and, by that predisposition, subject to legitimate apprehension.

In the present case, Jacobson received two sexually explicit brochures from Customs and Postal and, in both cases, ordered obviously graphic depictions of child pornography. Faced with this damning evidence, the petitioner's only defense is that his delay in ordering the blatantly explicit magazines negates his predisposition. However, the truth is that petitioner had already exhibited his predisposition when he ordered *Bare Boys I & II* from *Electric Moon*. "Furthermore, the mailings of CSF were spread out over a period of time and, unlike personal contact, could easily be ignored by one not interested in their contact." *Thoma*, 726 F.2d at 1197. If Jacobson had wanted no part of the procedure, he could have done just as the courts in *Thoma* and *Myers* suggested: *just say no*. "Nobody forced [the defendant] to join CSF or to order illegal materials. The government did nothing more than give [the defendant] an opportunity to exercise his predisposition to collect child pornography." *Musslyn*, 865 F.2d at 947 ("Project Looking Glass"). Petitioner's complaint of a lack of predisposition rings hollow in light of these cases, which demonstrate that the true evidence would have been ignoring the mailings.

Other cases involving reverse stings of child pornography uphold this proposition about predisposition. In *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990), the Ninth Circuit Court of Appeals found sufficient predisposition based on a previous purchase of a child pornography magazine by the defendant. In that case, the magazine was

ordered from a known distributor of pornography, Catherine Wilson, and was entitled, *Skoleborn School Children*. Likewise, in the present case, petitioner ordered from a known distributor of pornography (*Electric Moon*) *Bare Boys I & II*, titles which at a minimum indicate child erotica. The other factor which influenced the *Mitchell* court was the lack of coercive behavior by the government. As in other "inducement" cases, the court felt simple mailings were not significant nor coercive inducements, an observation with which the jurors in the instant case must have agreed.

In *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988), the defendant came to the attention of postal inspectors through an advertisement he had placed in a magazine.[51] Petitioner argues that his behavior does not rise to the level of sufficient predisposition. However, was Goodwin's predisposition more evident from the advertisement than was Jacobson's by the ordering of the magazines, *Bare Boys I & II*? Unless one understands the language of the pedophile or child pornographer, phrases such as "Lollitots," "Moppets," "Lolita," or "Piccolo" probably would mean less and certainly no more than does the title *Bare Boys*. Ironically, Goodwin consummated his dealings with the postal inspector by ordering the exact same magazine, *Boys Who Love Boys*, that petitioner had ordered. The Fourth Circuit used the "masked" advertisement, coupled with the defendant's response to the mailing (in which he said he was interested in teenage and pre-teenage sexual activity and ordered *Bare Boys*) to find "substantial previous evidence of predisposition." *Goodwin*, 854 F.2d at 35.

In *United States v. Driscoll*, 852 F.2d 84 (3rd Cir. 1988), the defense argued "outrageous government conduct" which this Court has said is the last resort for the defense if an entrapment argument fails because of predisposition.

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[51] Wanted: Lollitots, moppets and chicken magazines and photographs. If you have single copies you want to sell, send you telephone number to MP Code 3941. See *United States v. Goodwin*, 854 F.2d at 34.

Russell, 411 U.S. at 431-432 *citing Rochin v. California*, 342 U.S. 165 (1952). Since the parallels between Driscoll's and Jacobson's predisposition are remarkable, it is noteworthy that both the court and the defense in *Driscoll* readily accepted the predisposition of the defendant. First, Driscoll had previously ordered "child erotica," just as petitioner had done. Second, both names were found on mailing lists of known pornographers. Finally, the postal authority sent inquiries to both individuals that eventually led to the order, payment and delivery of the child pornography.

". . . [T]he most important element of the [predisposition] equation is whether the defendant was reluctant to commit the offense." *Thoma*, 726 F.2d at 1197. In *Thoma*, the defendant was sent two initial mailings by the postal authority to which he did not respond. This differs greatly from petitioner's behavior in that he affirmatively responded to both initial mailings by requesting information and indicating an interest in teenage sexuality. The defendant in *Thoma* does not order any child pornography until there have been at least eight contacts and at least two refusals to respond. Petitioner, on the other hand, responded on all four contacts and ordered the child pornography simply in response to a mailing. The court in *Thoma* ruled that predisposition existed even though much reluctance was demonstrated. If *Thoma* is used as a measuring stick, petitioner's behavior exhibits no reluctance and predisposition abounds.

In summary, entrapment can only be established as a matter of law when the *presence* of outrageous, intrusive and overbearing government inducements and the *absence* of petitioner's predisposition to commit a crime is apparent from the *uncontradicted evidence*. *Jacobson*, 916 F.2d at 470, *citing Thoma* 726 F.2d at 1197. See also *Russell*, 411 U.S. at 431-432; *Sorrells*, 287 U.S. at 442; *Sherman*, 356 U.S. at 369. The prior ordering of two magazines featuring teenage nudity and sexually explicit activity, and orders for brochures indicating other places to obtain child pornography and child erotica from known pornographers pro-

vide ample evidence of predisposition. Similarly, his consistent affirmative responses to undercover mailings indicating his interest in child pornography underscore his predisposition in this case. Clearly, offering someone through the mail an opportunity to purchase obviously illegal material, *Boys Who Love Boys*[52] is not improper inducement. When the opportunity was finally presented to obtain child pornography, Jacobson eagerly rose to the bait, not once but twice, to order from undercover postal and customs authorities.

Finally, Jacobson's conviction by a jury of his peers should not be disturbed. The jurors heard all the testimony and are in the best position to weigh the evidence, resolve conflicts if any exist, and ascertain the truth concerning whether a crime exists. Any second guessing by the Court usurps the jury's province and substantially erodes law enforcement's ability to stop "these harms [from child pornography] which collectively are consequential damages that flow from the trespass against the dignity of the child." *United States v. Weigand*, 812 F.2d 1239, 1245 (9th Cir. 1987).

CONCLUSION

The Eighth Circuit Court of Appeals' decision in the present case should be upheld because there is no entrapment as a matter of law and such undercover "reverse stings" are essential to discover and eliminate child pornography and the sexual exploitation of children.

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[52] Described as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."

Respectfully submitted,

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APPENDIX

APPENDIX

DESCRIPTION OF AMICI

The National Center for Missing and Exploited Children

The National Center of Missing and Exploited Children (the "Center") is a non-profit, tax-exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under the Missing Children's Assistance Act (42 U.S.C. §§5771-5777), including operation of the national toll-free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearinghouses, non-profit organizations, and interested child advocates, and training to professionals.

National Law Center for Protection of Children and Families

National Law Center for Protection of Children and Families ("National Law Center") is a Washington D.C. metro based organization dedicated to the protection of children and the preservation of families though the enforcement of existing laws and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through the legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

Consultation with many county, city and civic leaders around the nation allows the National Law Center to assist in the drafting and enactment of new legislation. This legislation concerns obscenity, child pornography, materials harmful to minors and the appropriate time, place and manner regulation of sexually oriented businesses. The National Law Center is also involved in the dissemination of vital information to legislators, law enforcement, public officials and concerned citizens alike.

Seminars, newsletters and updated prosecutors' manuals are part of the National Law Center's strategy. This strategy is dedicated to equipping law enforcement with the necessary information, pleadings, and legal techniques necessary to win the war for our children and families.

The National Law Center has participated in numerous Amici Curiae briefs in cases that have a direct impact on children and family issues, including the recent Supreme Court cases of *Osborne v. Ohio* and *Maryland v. Craig*. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and pornography. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The National Coalition Against Pornography

The National Coalition Against Pornography ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity and child pornography and to implement a number of programs designed to eliminate them from our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; the S.T.O.P.! Campaign (Stand Together Opposing Pornography, an intensive media-based campaign developed by N-CAP to help local communities push for the elimination of illegal obscenity/child pornography though law enforcement); legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representatives and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. N-CAP has also been instrumental in the development of a number of other related groups. N-Cap was the catalyst in the founding of the Religious Alliance

Against Pornography (RAAP) in 1986. RAAP consists of the highest level leadership of nearly fifty denominations, faith groups and inter-faith organizations, all united around the single common objective of eliminating hardcore and child pornography. Members include leaders in the Roman Catholic, Jewish, Protestant, Greek Orthodox and Mormon communities which represent over one million individuals throughout the United States. Dr. Kirk, president of N-CAP, also serves as the Chairman of RAAP.

The fundamental mission and purpose of N-CAP is in protecting children and families through the elimination of child pornography and obscenity. N-CAP was formed as a result of a group of local citizens and ministers in Cincinnati, Ohio who had seen and counseled firsthand hundreds of families devastated by illegal pornography. N-CAP has provided substantial efforts nationwide in support of the enforcement of the statute before the Court.

National Family Foundation

National Family Foundation (the "Foundation")is a non-profit organization which was organized to collect, synthesize, and integrate medical, clinical, and social science evidence and theory from the United States and Europe. Its purpose is to bring greater understanding to the problems of the American family and to develop guidelines for healthy parenting and successful child rearing.

The Foundation analyzes research findings in the light of their larger implications to society. It encourages those who have been successful in clinical practice to apply what they have learned in their counseling rooms to larger societal problems. It explores the links between family, character, culture, and media.

Athletes For Kids

Athletes For Kids ("AFK") is a non-profit organization started in 1986 in the Commonwealth of Virginia by Brad Curl to address the illicit sex and pornography problem among teenagers with positive, demand reduction solu-

tions. AFK represents over 200 top professional athletes and dozens of leading corporate executives who are concerned about the destructive impact of a ten billion dollar per year pornography industry which exploits women, children and men. AFK has produced a video to use in school assemblies featuring the athletes and introduced it in a nine city campaign in the spring of 1989. AFK will be showing the video in hundreds of schools in the coming year and holding leadership meetings in cities coast to coast. AFK's main purposes are to educate young people, train athletes to speak on the destructive effects of pornography and pre-marital sex and to rally city leaders to make a stand against pornography in their communities.

AFK is very concerned that the government does its job in prosecuting obscenity, child pornography and child exploitation and enforcing regulations against indecent broadcasts and telephone services.

AFK believes that the criminal laws against the possession of child pornography and aggressive enforcement such as reverse stings will significantly curtail child molestation and related harms which are inflicted upon America's besieged children.

(9)

No. 90-1124

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Keith Jacobson

Petitioner,

v.

The United States of America

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR AMICI CURIAE HON. THOMAS J. BLILEY, JR., ET AL. IN SUPPORT OF RESPONDENT

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Congressman Curt Weldon

Congressman Vin Weber

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases

Constitutional Authority

Statutes

Statutes

OTHER AUTHORITIES

CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of an Amici Curiae brief by the Honorable Thomas J. Bliley and other Members of the United States Congress (See Appendix.)

INTEREST OF THE AMICI CURIAE

Amici are Members of the United States Congress. Amici's interest in this case is prompted by the fact that Congress has enacted various pieces of legislation intended to suppress the sexual exploitation of children that occurs through the production, distribution, and possession of child pornography. By its very nature, production and trafficking in child pornography is highly clandestine. Those who traffic in child pornography generally place heavy reliance on the mails as the means for distributing and receiving materials depicting minors engaged in sexually explicit conduct. Therefore investigative techniques such as those employed in this case are essential to the vigorous enforcement of federal child pornography statutes. We

urge this Court to find that the defendant was not entrapped as a matter of law and was not subjected to governmental conduct so outrageous as to require that his conviction be overturned.

INTRODUCTION AND SUMMARY OF ARGUMENT

The defendant was convicted of violating 18 U.S.C. § 2252(a)(2), prohibiting the sexual exploitation of children through the receipt of materials depicting minors engaging in sexually explicit conduct. This Court has granted certiorari to review whether the defendant was entrapped as a matter of law.

When Congress enacted 18 U.S.C. § 2252, it sought to reach the evil of the sexual exploitation of children that is interwoven with the distribution of child pornography. In enacting and later amending that statute, Congress was aware of the covert traffic that occurs in children and child pornography. Congress was also aware of the innovative investigative techniques, such as those employed in this case, that are necessary to detect and apprehend those who

traffic in depictions of minors engaging in sexually explicit conduct.

The outcome of this case will do far more than affect the development of abstract principles of law. The outcome of this case will have very real effects on the well-being and lives of innocent children who are being sexually exploited in unspeakable ways. Therefore, we would urge the Court to consider the fact that any general rule that it may fashion expanding the entrapment defense with respect to postal investigations will have a severely debilitating effect on the enforcement of child pornography laws.

ARGUMENT

A. BOTH CONGRESS AND THIS COURT HAVE PREVIOUSLY RECOGNIZED THE COMPELLING GOVERNMENTAL INTEREST IN PROHIBITING CHILD PORNOGRAPHY.

1. The Protection of Children Against Sexual Exploitation Act of 1977.

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as dis-

tinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H. Rep. No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983) reprinted in 1984 U.S. Code Cong. & Admin. News, 492. The first measure passed by Congress to expressly reach such conduct was the Protection of Children Against Sexual Exploitation Act of 1977 (the "1977 Act"). The 1977 Act had three basic purposes: 1) to prohibit interstate transportation of boy prostitutes[1]; 2) to prohibit the use of children in the production of sexually explicit materials; and 3) to provide increased penalties for trafficking in obscene materials depicting children.

Congress' enactment of the 1977 Act reflected findings that child pornography and child prostitution had grown to

[1] Interstate transportation of minor female prostitutes was then prohibited under the Mann Act.

be a "highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977) reprinted in 1978 U.S. Code Cong. & Admin. News, 42. Congress found that the materials in question "depict children, some as young as three to five years of age, in couplings with their peers of the same and opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." Id. at 43. Such materials are produced in the form of magazines, "ten to twelve minute films known as 'loops,' still photographs, slides, playing cards, and video cassettes." Id.

The hearings which led to passage of the 1977 Act revealed "a close connection between child pornography and the equally outrageous use of young children as prostitutes." Id. at 44. Congress found that the typical boy victim of both pornography and prostitution related activities was between the ages of eight and seventeen and that the sexual exploitation of children through prostitution

and the production of pornography "cannot help but have a deep psychological, humiliating impact" on its victims. Id. Children who have been sexually exploited "often grow up in an adult life of drugs and prostitution... [and] many adults who were molested as children tend to become child molesters themselves, thus continuing the vicious cycle." Id. at 46.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

Id. at 43.

Finally, Congressional policy as expressed in the Committee report on the 1977 Act rejected the notion that Federal enforcement efforts should be limited solely to large scale distributors of child pornography. To the contrary, the House Judiciary Committee was "pleased to note

that in recent months federal authorities have begun a much more extensive crackdown on child pornography. For example, rather than just investigating large scale dealers in child pornography the Postal Service now investigates every complaint and every mail order advertisement for pornographic materials that depict children." Id. at 45.

The 1977 Act as it emerged from conference contained, inter alia, two new sections to title 18 (sections 2251 and 2252) prohibiting the sexual exploitation of children in the production of pornographic materials and trafficking or receiving such materials. As contained in the 1977 Act, it was an element of the trafficking offense that the materials involved be "obscene."

(2) The Case of New York v. Ferber

This Court, in New York v. Ferber, 458 U.S. 747 (1982), had occasion to rule on a New York statute prohibiting the distribution of child pornography. The New York statute's prohibition was more sweeping than the version of 18 U.S.C. § 2252 as reflected in the 1977 Act inasmuch as it encompassed the distribution of materials which depict

children engaging in sexually explicit conduct whether or not such depictions are "obscene." In an opinion by Justice White, this Court upheld the statute from First Amendment attack based on three considerations of relevance here.

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Id. at 756-57, quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

Further, the Court found that:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759-760 (footnote omitted). The Court concluded, in part because of the compelling state interests involved, that child pornography was not protected by the First Amendment.

(3) The Child Protection Act of 1984

In response to the Supreme Court's decision in Ferber, Congress enacted the Child Protection Act of 1984. The Child Protection Act removed the "obscenity" element from the trafficking offenses under 18 U.S.C. § 2252. The Child Protection Act also extended the statutory prohibition to production and trafficking in child pornography for non-commercial purposes. As the House Judiciary Report states:

> Perhaps the most important limitation in existing law is the "commercial purpose" limitation ... Those persons who use or entice children to engage in sexually explicit conduct for the purpose of creating child pornography do not violate [18 U.S.C. § 2251] unless their conduct is for pecuniary profit ... Since the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement.

H. Rep. No. 536, 98th Cong., 1st Sess., at 2-3 (1983) reprinted in 1984 U.S. Code Cong. & Admin. News, 493-494.

(4)The 1986 and 1988 Acts

Congress revisited the issue of child pornography in 1986 following the release of the Final Report of the Attorney General's Commission on Pornography. The Report noted that a "significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and than either kept or informally distributed to other child abusers." Attorney General's Commission on Pornography, Final Report, at 406-407 (1986) (emphasis added). The Report continued:

> We have heard substantial evidence that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.

The Attorney General's Commission made three unanimous findings of particular relevance here. First, as this Court recognized in Ferber (see 458 U.S. at 756), the Commission found that child pornography constitutes a "permanent record" of the sexual abuse visited upon the child and, further, that such depictions "follow the child up to and through adulthood" causing harms which are "independent of the harms attendant to the circumstances in which the photographs were originally made." Final Report at 411. The Commission also found that "there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children." Id. (emphasis added). The victims of molestation "are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it." Id.

Reflective of these concerns, the 99th Congress enacted both the Child Sexual Abuse and Pornography Act of 1986 and the Child Abuse Victim's Rights Act of 1986. The Child Abuse Act of 1986 provides further sanctions against the sexual exploitation of children for non-commercial purposes by once again amending the Mann Act so that it would apply to the interstate transportation of children for prohibited sexual purposes (including the production of sexually explicit materials) regardless of whether the defendant had a commercial purpose. The Act also amended 18 U.S.C. § 2251 to prohibit advertisements knowingly made either for children to participate in the production of pornographic materials or for such materials. Penalties for these new offenses were the same as those available for child pornography production and trafficking offenses.

The Child Abuse Victim's Rights Act of 1986 increased the penalty provisions of 18 U.S.C. §§ 2251 and 2252 and increased the mandatory minimum penalty for subsequent convictions under either statute from two to five years.

Pub.L. 99-500, Title I, Section 101(b) [Title VII, Sections 702, 704], Oct. 18, 1986, 100 Stat. 1783-75; Pub.L. 99-591, Title I, Section 101(b) [Title VII, Sections 702, 704], Oct. 30, 1986, 100 Stat. 3341-74.

Congress revisited these statutes again in 1988 when it enacted the Child Protection and Obscenity Enforcement Act of 1988 as part of the Anti-Drug Abuse Act, P.L. 100-690, Sec. 7501, 102 Stat. 4485 (1988). Among other things, the Act strengthened the criminal and civil forfeiture provisions applicable to child pornography offenses, amended R.I.C.O. (18 U.S.C. 1961) to make violations of 18 U.S.C. §§ 2251 and 2252 predicate offenses, and imposed recordkeeping requirements on the producers and distributors of pornographic materials.

From 1983 to mid-1986, a total of 194 bills were introduced and 13 hearings took place, focusing specifically on aspects of child abuse or child sexual exploitation[2]. In the midst of this, the U.S. Senate Committee on Governmental

[2] Report to the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of United States Senate by Congressional Research Service, Washington, June, 1986.

Affairs, Subcommittee on Investigations, conducted a study and issued various findings on the subject of "Child Pornography and Pedophilia," contained in Report 99-537. This Report found, among other things, that "no single characteristic of pedophilia is more pervasive than the obsession with child pornography." S. Rep. No. 537, 99th Cong., 2d Sess., 9 (June, 1986). The Report continued:

> Each convicted child molester interviewed by the Subcommittee either collected or produced child pornography or both.... It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities - alone, with other children, with adults, and even with animals. In some child pornography, the children depicted are infants and toddlers, some as young as 18 months.

Id. The Report also found that, "as a large number of cases illustrate, child molesters come from virtually every type of background in society" and that "to their neighbors and co-workers they were often respected, responsible members of the community, remembered by some acquaintances as being 'great with kids.'" Id. at 3.

In part because consumption of child pornography and child molestation are so closely connected, and in part because those who commit such crimes are so difficult to detect and apprehend, the Report recommended that law enforcement "task forces must be engaged in 'proactive' investigations, and not just respond to crises as they occur.... Duties of the task forces would include ... (c)onducting proactive and undercover investigations." Id. at 47.

(5)The Case of Osborne v. Ohio and Congress' Response

Finally, in response to Osborne v. Ohio, 495 U.S. _____, 110 S.Ct. 1691 (1990), Congress revisited child pornography legislation. Osborne involved the State of Ohio's statute proscribing the possession of child pornography, even in one's own home. In upholding the statute's constitutionality, the Court again addressed the evil of this vile crime:

> ...(E)ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.... Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribu-

tion chain.

Id. at 1697. As a result, Congress amended 18 U.S.C. § 2252 to outlaw the possession of child pornography as a part of the Crime Control Act of 1990. Again, recognizing the terrible tragedy of this crime against children and the great government interest in stamping it out at all levels -- production, distribution, and possession[3].

The current federal statutes prohibiting the production of and trafficking in child pornography are based upon findings made by all three branches of the federal government concerning the harmfulness of such activities both to the specific child victims involved and to society at large. Moreover, Congress fully recognized that the distribution of child pornography involved highly clandestine networks of distributors and consumers -- many of whom where themselves child molesters. It was fully anticipated by the Congress that law enforcement authorities would develop

[3]Congress in 1990 also restored the record keeping provision of 18 U.S.C. § 2257 requiring producers of sexually explicit materials to keep adequate records and documentation of the "actors," including their ages and other relevant information.

appropriate techniques for discovering and apprehending those involved in the distribution or consumption of child pornography. As discussed below, the investigative techniques employed in this case are essential to the effective enforcement of federal child pornography statutes.

B. LAW ENFORCEMENT TECHNIQUES OF THE TYPE EMPLOYED IN THIS CASE ARE ESSENTIAL FOR EFFECTIVE ENFORCEMENT OF CHILD PORNOGRAPHY.

As this Court recognized in Ferber and Osborne, the governmental interest in eradicating child pornography is tremendous. Also, because of the unique nature or the mechanics of how this crime takes place, unique law enforcement techniques and procedures must be employed. Such techniques include undercover operations, stings, reverse stings, and other "proactive" investigative methods.

> Given the sophisticated secretive manner in which many successful child molesters/pornographers operate, law enforcement has had to develop imaginative strategies to locate offenders and develop evidence of their crimes. One of the most successful techniques utilized is the so-called "reverse sting" operation wherein the government agency has offered, through an appropriate cover identity, to sell and ship child pornography to targeted in-

> dividuals under controlled deliveries, followed immediately by a search and seizure.

"The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney," Citizens for Decency through Law, Inc. (2nd ed.) p. 35 (1988).

Petitioner suggests that the use of such techniques may constitute unlawful entrapment per se when he states that:

> The red flags [of unlawful government inducement of the petitioner] fly in a stiff breeze in this case. Ray Mack's plan for intelligence gathering, the execution of which did not contemplate selling anything (T.R. 95:6) was administratively elevated in Washington, D.C. to a national program in which the postal authorities would actually solicit, advertise, sell, manufacture and deliver child pornography. The targets were completely passive. All they had to do was mail in their money, pick up the contraband at the post office and prepare to be indicted.

Petitioner's Brief at 28. Congress, however, was well-aware of the investigative challenges presented by the production and distribution of child pornography and of the methods, such as those used in this case by postal authorities to meet those challenges. While deliberating on the Child Protection Act of 1984, the House Judiciary

Committee received testimony from the U.S. Department of Justice that "the clandestine nature of the child pornography industry has made it extremely difficult to prosecute those who use children to produce pornographic material. Traditional investigative techniques, such as interviews and grand juries, are not always effective in making prosecutable cases." See. H. Rep. No. 536, 98th Cong. 1st Sess., at 12, reprinted in 1984 U.S. Code Cong. & Admin. News 503. The Committee also received testimony from the U.S. Postal Inspection Service on how child pornography investigations are conducted.

> During adult obscenity investigations, we are often able to order materials directly from solicitations or advertisements but, with child pornographers, we must gain access to the distributors' underground networks. We monitor those publications oriented toward pedophiles, and we maintain close contact with local police and social workers who, in their work, frequently come upon child abuse and\or child pornography. We also examine evidence, such as mailing lists seized during the execution of search warrants, in an effort to identify persons interested in this type of material... Our jurisdiction is limited to postal-related offenses, and investigations generally follow an identification, test correspondence, test pur-

chase procedure.

Id. at 507. The testimony from both agencies was included in full in the report of the Judiciary Committee on the 1984 Act.

The necessity for these type of investigative methods has also been recognized by various courts. In United States v. Esch, 832 F.2d 531 (10th Cir. 1987), cert. denied, 485 U.S. 908, 991 (1988), the U.S. Postal Service commenced an undercover operation which targeted suspected pedophiles. A co-defendant returned a questionnaire which the postal agent interpreted as indicating an interest in pedophilia. As the result of a series of correspondence, the defendants were arrested and convicted of sexual exploitation of children. The defendants argued that the postal inspectors' conduct in carrying out the undercover operation -- the reverse sting -- was so outrageous that their convictions should be reversed on due process grounds. The Court stated, however:

> We hold that the undercover operation did not constitute intolerable governmental conduct.... While it is true that [the postal agent] encouraged [the co-defendant] to take photographs, and that other mail

> was forwarded during the course of the "Love Land" operation, the postal inspectors' conduct was not outrageous in light of the clandestine nature of the activity that they were investigating. To the contrary, we agree with the trial court's observation that it was reasonable for the postal inspectors to assume that the only way they could ferret out suspected pedophiles was to encourage the photograph[ing] and mailing of what was otherwise being done or what they thought was being done.

Id. at 538-39 (emphasis added). See also U.S. v. Rubio, 834 F.2d 442, 450-51 (5th Cir. 1987)(no entrapment as a matter of law in spite of the fact that "Government engaged in extensive efforts to cause Rubio to purchase and send child pornography through the mail.")

The use of undercover investigation of child pornography violations has been addressed numerous times by various courts. The courts have continually recognized the need for such operations in view of the unique nature of the crime and the great societal interests at stake. The courts have rejected entrapment and outrageous conduct defenses in factual situations similar to the one involved here. See United States v. Thoma, 726 F.2d 1191 (7th Cir.)(not entrapment as a matter of law although defendant was

reluctant to respond to governments' mailings, in fact ignoring first two), cert. denied, 467 U.S. 1228 (1984). Rubio, supra (defendant did not respond to government's initial inquiry); United States v. Orton, 742 F.Supp. 562 (D. Or. 1990)(defendant not entrapped by government's correspondence, although initial contact had nothing to do with child pornography, but rather was an advertisement in a "swinger's" magazine); United States v. Nelson, 847 F.2d 285 (6th Cir. 1988)(postal inspector sending five letters from four sources not entrapment even though defendant ignored first four letters); United States v. Porter, 709 F.Supp. 770 (E.D. Mich. 1989)(defendant's name obtained from mailing list of pornography distributor, although no showing that child pornography previously distributed to defendant, the court found no entrapment), aff'd without opinion, 895 F.2d 1415 (6th Cir.), cert. denied, 111 S.Ct. 583 (1990).

C. EVIDENCE OF DEFENDANT'S PREDISPOSITION TO RECEIVE CHILD PORNOGRAPHY IS SUFFICIENT AS A MATTER OF LAW

Defendant's predisposition to receive child pornography was evidenced by his initial order of the two magazines, featuring photos of nude adolescent boys. United States v. Jacobson, 916 F.2d 467, 468 (1990). Subsequent actions by the defendant further support the theory that defendant had the requisite intent and state of mind to be the proper subject of investigation.

The entrapment defense focuses on the accused's predisposition to commit a crime. United States v. So, 755 F.2d 1350, 1354 (9th Cir. 1985). Predisposition is, by definition, "the defendant's state of mind and inclinations before his initial exposure to the government agents." United States v. Jannotti, 501 F.Supp. 1182, 1191 (E.D. Pa. 1980), rev'd on other grounds, 673 F.2d 578 (3rd Cir.), cert. denied, 457 U.S. 1106 (1982). The government had no contact with the defendant until after the mailing list, containing the defendant's name, was seized in the California bookstore. Prior to any governmental involvement, defen-

dant had already ordered and received materials demonstrating his sexual preference for male children. It is of no significance whether the materials were legally child pornography or not. The mere ordering of this type of materials -- magazines featuring photos of nude adolescent boys -- demonstrates the defendant's tendency towards pedophilia, and, as explained earlier, child pornography is almost always tied to pedophilia. Thus, defendant's pre-exposure activities established an "inclination" toward the particular criminal behavior at issue.

Although predisposition exists before contact with the government, courts have recognized that in most cases it must be determined after the fact. Typically, proof of predisposition is inferred from examination of defendant's conduct after the initial contact with the agents. United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983). A factor in determining this predisposition is whether the defendant evidenced any reluctance to engage in criminal activity which was overcome by government inducement. United States v. Reynoso - Ulloa, 548 F.2d 1329, 1336 (9th

Cir. 1977), cert. denied, 436 U.S. 926 (1978). Predisposition of criminal intent has been found where the defendant is "ready and willing" to commit the crimes as soon as the first opportunity is presented by the government. United States v. Sherman, 200 F.2d 880, 882 (2nd Cir. 1952).

The defendant showed no reluctance to receive child pornography. To the contrary, defendant affirmatively responded to offers of pornography. It is important to remember that defendant paid a membership fee, indicating his preference for preteen sex, in response to a governmental inquiry. When a postal inspector contacted him a second time, he responded again with a desire to receive more materials and expressing an interest in "teenage sexuality." When invited to order a catalog of child pornography, he jumped at the opportunity, and then from it ordered Boys Who Love Boys, described in the catalog as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Jacobson did "love" boys and the government's actions here

simply gave him an opportunity to act on that predisposition. All correspondence was done through the mail, giving defendant every opportunity to disregard the offers by simply tossing them in the wastebasket. In fact, if the defendant felt harassed by these mail inquiries, he could have complained to his local mail authorities. Any doubt as to defendant's predisposition prior to government contact can be negated by his willing participation in the mail order pornography business. His pre-existing appetite for child pornography was merely exposed. The defendant was not induced to do anything he was not "ready and willing" to commit.

D. THE ACTIVITIES OF THE GOVERNMENT WERE NOT SUFFICIENTLY OUTRAGEOUS TO PROVIDE THE DEFENDANT WITH A SEPARATE DEFENSE OF OUTRAGEOUS CONDUCT.

The defendant's predisposition to commit the crime of receiving child pornography forecloses the possibility that his due process rights were violated, because he had no

constitutional right to possess child pornography. Osborne v. Ohio, 495 U.S. ____, 110 S.Ct. 1691 (1990).

In Hampton v. United States, the Court recognized that there can be no separate defense of "outrageous conduct" which would violate defendant's due process rights when the defendant had no right in the first place. 425 U.S. 484 (1976) (plurality opinion -Rehnquist, with White and Chief Justice Burger joining). However, if the result of the government activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense," then the defense of entrapment is available. Id. at 490, quoting Sorrells v. United States, 287 U.S. 435 (1958). Although five justices recognized in Hampton that defendant's predisposition is irrelevant when the conduct is truly outrageous, this defense has been very rarely used or successful. See United States v. Warren, 747 F.2d 1339 (10th Cir. 1984). Post-Hampton cases have held the standard of proof of outrageous conduct to be very high. Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990). The cases indicate that due process grants wide leeway to law

enforcement agencies in their investigation of a crime. Kaminski, 703 F.2d at 1009.

The activities of the government here were a far cry from "outrageous." The postal inspectors did not implant in defendant's mind any criminal intent that was not there prior to the investigation. As the Eighth Circuit summarized:

> All told, the postal inspectors mailed Jacobson two sexual attitude surveys, seven letters measuring his appetite for child pornography, and two sex catalogues. Jacobson responded with interest on eight occasions.

916 F.2d at 468. This was only ten mailings over a period of twenty-seven months and, again, the defendant could have simply ignored them all.

Given the policy arguments supporting the eradication of child pornography in this country, the leeway given to government officials to use undercover tactics, as found in this case, is necessary and justifiable. See Jannotti, 501 F.Supp. at 1189.

Therefore, because the defense of outrageous governmental conducts rests on the assumption that a right was violated, it is not available in this case because the defendant has no right to possess child pornography.

CONCLUSION

By enacting 18 U.S.C. § 2252, Congress sought to suppress and eliminate the evil of sexual exploitation of children through the distribution of materials depicting minors engaged in sexually explicit conduct. Congressional efforts to protect children from such exploitation extend over a thirteen year period. They reflect a clear expectation that law enforcement authorities would develop the type of innovative investigatory techniques employed in this case. We ask this Court to consider that a decision sharply curtailing the use of such techniques will frustrate the policies that Congress has for so long labored to erect. We urge that the Court find that petitioner was neither entrapped as a

matter of law nor subjected to governmental conduct so outrageous as to require that his conviction be overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amici Curiae, Hon. Thomas J. Bliley et al. have been sent by U.S. Mail, Postage Prepaid, on this 26th day of July, 1991, to:

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All parties required to be served have been served.

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APPENDIX

MOYER, MOYER, EGLEY, FULLNER & WARNEMUNDE
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July 22, 1991

VIA FACSIMILE AND U.S. MAIL

Mr. James P. Mueller
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RE: Jacobson v. United States
Docket No. 90-1124

Dear Mr. Mueller:

This letter is to confirm that you have my consent to file an amicus curiae brief in the above captioned case.

However, the Jacobson case has nothing to do with child pornography since the only exploiter of children in this case was the Government.

Of course, I am sure groups like yours are not a bit interested in what the Government did in this case because you undoubtedly believe that the Government can do no wrong.

Yours truly,

MOYER, MOYER, EGLEY, FULLNER & WARNEMUNDE

By

GMM JR:jkn

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 22, 1991

David E. Anderson
Minority Chief Counsel
Congress of the United States
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Washington, D.C. 20515

Re: Jacobson v. United States, No. 90-1124

Dear Mr. Anderson:

This is in response to your letter of July 19, 1991.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of Congressman Thomas J. Bliley, Jr., and various other members of the Congress of the United States in the above case.

Sincerely,

Kenneth W. Starr
Solicitor General